TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899

No. 887

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE [illegible] SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED MAY 16, 1900.

(16,890.)

(16,890.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 306.

THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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1 *Caption.*

THE STATE OF TEXAS, }
County of Travis. }

At a term of the district court of the 53rd judicial district, begun and holden at Austin, within and for the county of Travis, before the Hon. F. G. Morris, and ending on the 4th day of April, A. D. 1896, the following cause came on for trial, to wit:

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Plaintiff's Original Petition.

Filed December 8th, 1895.

THE STATE OF TEXAS, }
County of Travis. }

To the district court of the 53rd judicial district:

Plaintiff, The State of Texas, through her attorney general, C. A. Culberson, acting under direction of the governor, brings this suit against the Houston and Texas Central Railroad Company and says:

1st. The said company is incorporated under the general laws of the State of Texas.

2nd. Its general office and principal place of business is at Houston, Texas.

3rd. Its line of railroad runs into and through the county of Travis, in the State of Texas.

2 4th. Its local agent at Austin, in said county, is H. D. Patrick.

5th. The State of Texas made loans under the provisions of an act entitled "An act to provide for the investment of the special school fund in the bonds of railroads incorporated by the State," approved August 13th, 1856, to the Houston & Texas Central Railway Company, as follows:

On April 13, 1857, one hundred and fifty thousand dollars;
On October 28, 1857, sixty thousand dollars;
On May 31, 1858, sixty thousand dollars;
On July 6, 1858, thirty thousand dollars;
On February 23, 1859, thirty thousand dollars;
On June 15, 1859, thirty thousand dollars;
On July 22, 1859, thirty thousand dollars;
On August 2, 1859, thirty thousand dollars;
On August 20, 1859, thirty thousand dollars;

and said company executed — delivered to the State of Texas, in consideration of said loans, bonds as follows:

One dated March 25, 1857, for one hundred and fifty thousand dollars;

One dated September 23, 1857, for sixty thousand dollars;

One dated January 28, 1858, for thirty thousand dollars;

One dated February 23, 1858, for thirty thousand dollars;

One dated February 23, 1858, for thirty thousand dollars;

One dated January 25, 1859, for thirty thousand dollars;

One dated May 14, 1859, for thirty thousand dollars;

One dated ——, 1859, for thirty thousand dollars;

One dated June 2, 1859, for thirty thousand dollars;

One dated July 29, 1859, for thirty thousand dollars;

said bonds being to the effect that said company would pay to the State of Texas, at the office of its treasurer, in the city of Austin, ten years from the respective dates of said bonds, the said several sums of money; would pay each year two per cent. of said several sums as sinking funds, and would pay interest on each of
3 them at the rate of six per cent. per annum, and said bonds expressly acknowledging the lien created by the act aforesaid to secure payment of loans made thereunder.

By the loans aforesaid and by the execution of said bonds the said company promised and became liable to pay at the dates severally indicated the several sums of money (principal, interest, and sinking fund) mentioned, and the State, to secure payment of said sums, became thereby invested with the lien aforesaid.

6th. That the State of Texas made, under the provisions of the act aforesaid and of an act approved January 28th, 1856, a loan to the Washington County Railroad Company, on June 29th, 1859, of sixty-six thousand dollars, and in consideration thereof the said company executed to the State its bond dated June 6th, 1859, to the effect that it would, ten years after the date thereof, pay to the State, at Austin, Texas, said sum; would pay annually two per cent. thereof as a sinking fund, and would pay interest thereon at the rate of six per cent. per annum, and acknowledging the lien created by the act aforesaid.

By the said loan and the bond aforesaid the said company promised and became liable to pay the said sum at the time indicated and the said sinking fund and interest, and the State became invested with the lien aforesaid.

7th. That on or before the 15th day of August, A. D. 1870, the Washington County railway became consolidated with and merged into the Houston and Texas Central railway and said Houston and Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railway Company.

8th. That the bonds aforesaid were not paid according to their tenor and effect and the property upon which the lien aforesaid attached became liable to sale.

9th. That prior to the 15th day of August, 1870, the Houston and Texas Central Railway Company had constructed on its
4 main line railroad as follows: A line of railroad, completely constructed, beginning at the original terminus of said road

on the left bank of Buffalo bayou, in the city of Houston, in Harris county, Texas, and running thence in a general northwesterly direction through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, and Limestone, including the 1st, 2nd, 3rd, 4th, 5th, and 6th sections of twenty-five miles each, to a point one hundred and fifty miles *to* the place of beginning, about three miles south of Kosse, in Limestone county.

10th. That prior to the 15th day of August, 1870, the Washington County Railway Company and the Houston and Texas Central Railway Company had constructed of what is now known as the Western branch of the Houston and Texas Central railroad road as follows: A line of railroad beginning at the point of junction of said Western branch with the track of the main line of the Houston and Texas Central railroad in the town of Hempstead, in Waller county, thence in a general westerly direction through Waller and Washington counties for about twenty-one and a quarter miles to a point in the town of Brenham, in Washington county.

11th. That under the terms of the said act of August 13th, 1856, and under the terms of the bonds aforesaid a lien to secure payment of the said bonds attached to all of said road, viz., said one hundred and fifty miles of the main line of the Houston and Texas Central railway and twenty-one and a quarter miles of the Western branch thereof, and to all charter rights of said company, or companies, including the road-bed, right of way, grading, bridges, iron rails, equipment and masonry, and to all stock subscribed for in said company or companies, and upon all depots and depot stations, all the property owned by said company or companies as necessary for their business.

12th. That on the 1st day of May, 1870, the aggregate amount due upon the bonds executed by the Houston and Texas Central Railway Company, principal and interest, was the sum of six hundred and fifty-seven thousand three hundred and twenty-four and $\frac{35}{100}$ths dollars ($657,324.35).

13th. That on the 1st day of May, 1870, the aggregate amount due upon the bonds executed by the Washington County Railway Company, principal and interest, was the sum of one hundred and three thousand eight hundred and forty and $\frac{1}{100}$th dollars ($103,840.01).

14th. That the Houston and Texas Central Railway Company accepted the terms of the act of August 13th, 1870, entitled "An act for the relief of railroad companies indebted to the State for loans from the school fund," and thereby promised and became liable to pay, in addition to said sum of $657,324.35 and said sum of $103.840.01, semi-annually, on the 1st day of November and the 1st day of May of each year, six months' interest at six per cent. per annum on said aggregate amounts, and in addition thereto on said dates a sinking fund of one per cent. of said amounts, in consideration of which promises the State, by the terms of said law, agreed not to make sale of the property upon which its lien existed so long as said payments were made.

15th. That thereafter to May 1st, 1879, said semi-annual interest

and sinking fund was paid by the Houston and Texas Central Railway Company upon said sum of $103,840.01, but that no payment of principal or interest was made on November 1st, 1879, nor within ten days thereafter, nor has any such payment been since made, and upon said failure to pay within ten days after the 1st day of November, A. D. 1879, the entire balance remaining then unpaid of said sum, amounting to $86,655.90, became at once due and payable.

16th. That up to and including the 1st day of May, 1893, the said semi-annual interest and one per cent. sinking fund was paid by said Houston and Texas Central Railway Company and defendant upon said sum of $657,324.35, but the next semi-annual interest and sinking fund was not paid, but the sum of $2,620 only was paid; the balance thereof was not paid, nor has it or any part of it since been paid, and upon said failure to pay within ten days after the 1st day of November, A. D., 1893, the entire balance of
6 $411,935.84 remaining then unpaid of said sum of $657,324.35 became at once due and payable.

17th. That upon said sum of $86,655.90 there has become due each six months from said first day of May, 1879, up to the present time semi-annual interest at the rate of six per cent. per annum, and there is due upon each of said installments of unpaid interest interest from the dates upon which they respectively became due at the rate up to July 1st, 1891, of eight per cent. and since then of six per cent.

18th. That upon said sum of $411,935.84 there has become due upon May 1st, 1894, semi-annual interest at the rate of six per cent. per annum and upon November 1, 1894, a like amount, and since those dates upon said unpaid installments interest at six per cent.

19th. That upon the 1st day of July, A. D. 1886, all the property of the Houston and Texas Central Railway Company, including the property upon which the State has the lien aforesaid, was sold judicially, and the purchaser and his associates formed under the laws of this State the corporation herein styled defendant.

20th. That said Washington County and Houston and Texas Central Railway Companies are defunct; that their corporate existence has been terminated; that neither of them has a president, directors, or other officers or stockholders or other representatives upon whom service may be had, and that there is no way of bringing said defunct corporations before this court.

21st. That The Houston and Texas Central Railroad Company, defendant, claims as the legal owner (subject to the lien heretofore mentioned) and is in possession of all the property upon which the lien above set forth exists.

22nd. Plaintiff prays that judgment be given it that there is due upon the obligations aforesaid the sums of money heretofore stated, with interest as set forth, and that payment thereof is secured by the liens on the property aforesaid; that said property be sold
7 as under execution, and that the proceeds be applied to the payment of said sums, with interest, and of costs, and that it

have such other relief, including the appointment of a receiver, as in the premises should be given.

C. A. CULBERSON,
Attorney General of Texas.

Endorsed: No. 11915. The State of Texas *vs.* The Houston & Texas Central Railroad Co. Plaintiff's original petition. Filed December 8, 1894. Jas. P. Hart, cl'k, by Fred C. Davis, dep.

Defendant's First Amended Original Answer.

Filed May 15th, 1895.

In District Court of Travis County, Texas, Fifty-third Judicial District, at Austin.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Now comes The Houston & Texas Central Railroad Company, defendant in the above styled and numbered cause, by attorney, and by leave of court files this its first amended original answer in lieu of its original answer herein filed on the 7th day of January, 1895, and demurs to plaintiff's petition exhibited against it in this cause and says the same is insufficient in law to require this defendant to answer thereto; and of this defendant prays judgment of the court

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II.

If its demurrer be overruled and if it is required to answer further herein, then the said Houston & Texas Central Railroad Company comes, by attorney, and denies all and singular the allegations in plaintiff's petition contained, except such as may be hereinafter expressly admitted; and of this *he* puts *him*self upon the country.

III.

And for further plea in this behalf said Houston & Texas Central Railroad Company comes, by attorney, and says:

1. That the State of Texas by an act entitled "An act to establish a system of schools," approved January 31st, 1854, set apart and appropriated the sum of two million dollars of the five per cent. bonds of the United States then in the treasury of the State as a school fund for the support and maintenance of public schools, and declared and enacted that said funds should be called the special school fund, and provided that the interest arising therefrom should be apportioned and distributed for the support of schools in the manner and under the regulations in said act prescribed; and, in accordance with said act, defendant says that said bonds were set aside and said special school fund was thereby created and established. Defendant here refers to said act and prays that the same

be read as a part hereof with the same effect as though it were set forth in full herein.

2. That by an act entitled "An act to provide for the investment of the special school fund in the bonds of railroad companies incorporated by the State," approved August 13th, 1856, the State of Texas by law enacted, among other things, that the governor, comptroller, and attorney general should *ex officio* constitute a board of school commissioners, whose duty it should be to draw from the treasury the special school fund created by the aforesaid act, approved January 31st, 1854, entitled "An act to establish a system of schools," and any additions to such fund, and should invest the same as provided in said act; that the aforesaid bonds belonging to such special
9 school fund should be by said board of school commissioners loaned to legally incorporated railroad companies in this State at an interest of six per cent. per annum, and upon other terms and conditions in said act specified; that such loan should be secured by the bonds of such railroad companies, made and executed to the State of Texas in the corporate name of such company, signed by the president and countersigned by the secretary or treasurer under the seal of such company, and that such bonds should constitute a lien upon the road and charter rights of such company, including the road-bed, right of way, and other property in said act more specifically referred to; that, in addition to the annual interest of 6 per cent., from the company accepting any loan under the provisions of said act said company should pay annually, at the expiration of each year from the date of the loan, the further sum of two per cent. upon the amount of the loan into the treasury of the State for the purpose of establishing a sinking fund to be applied towards the payment of the loan at its maturity, and the amounts so paid for the purpose of such sinking fund, with their accumulations, should be credited to such company. Defendant now here refers to said act for further statement of its terms, provisions, and conditions, and asks that the same be read as a part hereof with the same effect as if it were set forth at length herein.

That section 3 of the aforesaid act of August 13th, 1856, was amended by an act entitled "An act to amend the third section of an act entitled 'An act for the investment of the special school fund in bonds of railroad companies incorporated by the State,'" approved August 26th, 1856, the effect of which amendment was to authorize such loan only to railroad companies theretofore chartered by the State of Texas. Defendant now here refers to said amendatory act and asks that, as far as material, the same be read with the same effect as though it were set forth at length herein.

That said act of August 13th, 1856, was further amended by an act entitled "An act to amend the fourth section of an act to pro-
10 vide for the investment of the special school fund in the bonds of railroad companies incorporated by the State, passed August 13th, 1856," approved January 22nd, 1858, the only effect of which amendment was to authorize the loan to companies entitled thereto upon the completion of sections of ten miles of their respective roads instead of sections of five miles, as originally authorized. Defendant

here refers to said amendatory act and asks that the same be read, as far as material, as a part hereof with the same effect as though it were set forth at length herein.

3. That the Houston & Texas Central Railway Company, a railroad corporation duly created and chartered under the laws of the State of Texas prior to August 13th, 1856, for the purpose of building a railroad in the State of Texas, and the Washington County Railroad Company, likewise a railroad corporation duly created and chartered under the laws of the State of Texas prior to August 13th, 1856, for the purpose of building a railroad in the State of Texas and each being entitled thereto under the provisions and conditions of the aforesaid act of August 13th, 1856, applied for in the manner in and by said act provided and obtained from the State of Texas the loan of a portion of the aforesaid special school fund, created, as hereinbefore alleged, by the act entitled "An act to establish a system of schools," approved January 31st, 1854; that the amount of said fund borrowed by the said Houston & Texas Central Railway Company aggregated the sum of four hundred and fifty thousand dollars, which was received by it in some of the bonds of the United States originally set apart under the provisions of the aforesaid act of January 31st, 1854, creating said special school fund, and also in specie upon different dates and in different amounts between the 25th day of March, 1857, and the 20th day of August, 1859, and about the dates and approximating the several amounts specified in plaintiff's original petition herein, but this defendant is not informed whether said Houston & Texas Central Railway Company executed and delivered the bonds described and referred to in plaintiff's
11 said petition as therein alleged, and it demands proof thereof; that the amount of said fund borrowed by the said Washington County Railroad Company aggregated the sum of sixty-six thousand dollars which was received by it in some of the bonds of the United States set apart under the provisions of the aforesaid act of January 31st, 1854, creating said special school fund, and also in specie about the 6th day of June, 1859, as alleged in plaintiff's original petition herein, but this defendant is not informed whether said Washington County Railroad Company executed and delivered the said bond described and referred to in plaintiff's said petition as therein alleged, and it demands proof thereof.

4. That, in accordance with the terms and conditions of the laws hereinbefore referred to, said Houston & Texas Central Railway Company paid in cash to the treasurer of the State of Texas, who was authorized to receive the same upon the dates when the same were due and as hereinafter specified, the several sums of money hereinafter shown, which were received by said treasurer and applied to the payment and satisfaction of the interest then due upon and as a sinking fund to satisfy the principal of the aforesaid loan, to wit:

		Principal.	Interest.
On or about	March, 1858		$7,915.00
" " "	" "		1,240.00
" " "	April 14, 1858	$3,000.00	
" " "	November 4, 1858	1,200.00	
" " "	February 12, 1859		9,000.00
" " "	" " "		3,600.00
" " "	" " "		1,350.00
" " "	" " "		1,350.00
" " "	" " "		1,168.76
" " "	" 28, 1859		25.00
" " "	April 12, 1859	3,000.00	
" " "	May 31, 1859	1,200.00	
" " "	July 5, 1859	600.00	
" " "	November 1, 1859	1,200.00	
" " "	February 23, 1860	600.00	
" " "	March 1, 1860		24,152.45
" " "	April 13, 1860	3,000.00	
" " "	May 31, 1860	1,200.00	
" " "	June 15, 1860	600.00	
" " "	July 10, 1860	600.00	
" " "	August 31, 1860	1,800.00	
Total		$18,000.00	$49,801.21

12 Such payments satisfied and were made to and accepted by the State of Texas as satisfying the amount said Houston & Texas Central Railway Company was then required to pay on account of the principal and interest of said loan, in accordance with the terms and provisions of the aforesaid laws.

5. That, in accordance with the terms and conditions of the laws hereinbefore referred to, said Washington County Railroad Company paid in cash to the treasurer of the State of Texas, who was authorized to receive the same on or about February 28th, 1860, the sum of $2,899.45 on account of interest, and on June 6th, 1860, the sum of $1,320.00 on account of principal then due as a sinking fund upon the aforesaid loan, which sums were received by said treasurer, and applied by him accordingly. Such payments satisfied and were made and accepted by the State of Texas as satisfying the amount said Washington County Railroad Company was then required to pay on account of principal and interest of said loan, in accordance with the terms and provisions of the aforesaid laws.

6. That before the next payment of principal or interest upon said loan became due, either by the said Houston & Texas Central Railway Company or by the Washington County Railroad Company, and early in the year 1861, the civil war between Texas and the other States of the Southern Confederacy and the United States began, and, as a result of the commencement of such war, the business of said railway companies, in common with all other business and enterprises of the State, became paralyzed and said railway companies rendered utterly unable to pay either the in-

terest or sinking fund upon said loans as the same matured; that recognizing this, and in view of the distressing condition of the country at that time, the State of Texas passed an act which was approved January 11, 1862, entitled "An act for the relief of certain railroad companies of the State of Texas," which provided
13 that the payment of all interest and the two per cent. sinking fund due and to become due on the bonds issued by the several railroad companies of the State of Texas for loans from the special school fund should be, and the same was thereby, extended until the first day of January, 1864, or until six months after the termination of the then existing war between the Confederate States and the United States of America, should it terminate before said 1st day of January, 1864; and provided further that said act should in nowise impair the prior lien which the State then held upon any railroad for the payment of the loans and interest then due or to become due by said roads to the State.

7. That on account of the scarcity of money, the disturbance of trade, and the practical suspension of business as a result of the then prevailing war, the State of Texas was unable to collect the taxes necessary to the support of the State government or to meet its outstanding obligations, and had then outstanding its valid obligations in the form and of the character of warrants drawn by its comptroller on the State treasury for claims and demands against the State, but which the treasurer was unable to pay for lack of funds, when, for the purpose of aiding in the maintenance of its credit, on the 16th day of December, 1863, the legislature of Texas passed an act entitled "An act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due on their bonds," which act was approved December 16th, 1863, and was as follows:

"SECTION 1. Be it enacted by the legislature of the State of Texas: That the comptroller of the State be and he is hereby authorized to receive from the railroad companies in this State who are indebted to the special school fund, all interest on their bonds that may now be or hereafter become due, provided the same is tendered in State bonds or in State treasury warrants previous to the meeting of the next regular session of the State legislature.

"SECTION 2. That for all sums so paid in the comptroller
14 and treasurer shall issue to the special school fund the bonds of the State bearing 6 per cent. interest.

"SECTION 3. This act to take effect from its passage."

Under like circumstances and for the same object, the legislature of Texas passed an act entitled "An act amending an act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due or hereafter become due on their bonds," which act was approved May 28th, 1864, and is as follows:

"SECTION 1. Be it enacted by the legislature of the State of Texas: That the provisions of the act of which it is amendatory shall not apply to railroad companies that fail or refuse to receive State bonds

or State treasury warrants at par for freight or passage at the prices of rates established by law.

"SECTION 2. That whenever satisfactory evidence is produced or furnished to the comptroller of the State that any railroad company has failed or refused to receive the State bonds or State treasury warrants at par for freights or passage at the rates established by law he is required to refuse to receive the State bonds or treasury warrants for the interest due by said railroad upon its bond.

"SECTION 3. That the president of any railroad in this State be and is hereby required to post in a conspicuous place in the railroad offices and in the passenger cars the provisions and terms of this act under the penalty of $100 to be recovered for the benefit of the State by suit before any court of competent jurisdiction upon information of any party.

"SECTION 4. That all laws or parts of laws conflicting with this act be and the same are hereby repealed and that this act take effect from and after its passage."

Under similar circumstances attending the passage of each
15 of the two acts just above recited, and for the same purpose, the legislature of the State of Texas passed an act entitled "An act to authorize railroad companies to discharge their indebtedness to the special school fund with the treasury warrants and bonds and coupons of the State;" which act was approved and became a law November 16th, 1864, and is as follows:

"Be it enacted by the legislature of the State of Texas: That the railroad companies of this State that are indebted to the special school fund shall continue to be allowed the privilege of paying the interest due said fund in the treasury warrants and bonds and coupons of the State; and may also discharge the whole or any part of the principal of their indebtedness to that fund (in the same manner) provided such railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par with specie for freight and passenger travel.

That all treasury warrants and bonds and coupons of the State, so received into the State treasury, shall be cancelled; and the comptroller shall issue the bonds of the State, bearing six per cent. interest to the special school fund for the amount so paid in; and this act take effect from its passage."

8. This defendant says that upon the passage of the above-recited act approved December 16th, 1863, and in reliance upon the agreement and obligation of the State evidenced thereby and upon the pledge of the State thereby given to receive its bonds and treasury warrants from them and other railroad companies then indebted to the special school fund in payment of all interest on their bonds then or thereafter to become due, under the conditions in said act specified, the said Houston & Texas Central Railway Company and the said Washington County Railroad Company acquired for valuable and adequate considerations the so-called treasury warrants of the State of Texas referred to and specified in said act, intending to

pay and tender to the comptroller of the State of Texas in
16 payment of the interest on their indebtedness to the State of Texas, on account of said special school fund loan, within the time and upon the conditions specified in said act, and did tender and pay the same to said comptroller upon the dates hereinafter specified; and upon the passage of the above-recited acts approved May 28th, 1864, and November 15th, 1864, and in reliance upon the agreement and obligation of the State evidenced thereby, and upon the pledge of the State thereby given to receive its bonds and treasury warrants from them and other railroad companies then indebted to the special school fund in payment of all interest on their bonds then or thereafter to become due, as provided by the aforesaid act of May 28th, 1864, and upon the principal of said indebtedness as well, as provided by the aforesaid act of November 15th, 1864, and under the conditions in said act specified, the Houston & Texas Central Railway Company and the Washington County Railroad Company each received said bonds and State treasury warrants at par for freights and passage at the rates then established by the law, and the presidents of each of said companies posted in a conspicuous place in the railroad office and in the passenger cars of said companies the provisions and terms of the aforesaid act of May 28th, 1864, and satisfied the comptroller of the State that such treasury warrants and bonds and coupons of the State were so received by them at par with specie for freight and passenger travel, the sole inducement and consideration prompting said railroad companies to receive such treasury warrants at par for freight and passenger fares on their said railroads being the promise and agreement of the State of Texas evidenced by the aforesaid laws to receive the same in payment of the interest and principal of the aforesaid indebtedness of said companies to the State.

9. That having acquired the same for a valuable consideration, as hereinbefore recited, and having received the same, together with
17 the bonds and coupons of the State at par in payment for freight and passenger fares of their respective railroads, the said Houston & Texas Central Railway Company, as it was authorized to do by the above-recited acts, tendered, delivered, and paid to the comptroller of the State of Texas in payment of interest then due on its aforesaid indebtedness to the State of Texas the following sums in the treasury warrants of the State of Texas, upon the dates specified, to wit:

On January 20th, 1864,	the sum of	.....	$23,466.76
" March 30, 1864,	"	.....	6,670.00
" April 19, 1864,	"	.....	15,009.92
" " "	"	.....	4,000.00
" July 13, 1864,	"	.....	31,660.69
" August 20, 1864,	"	.....	2,000.00
" " 24, 1864,	"	.....	22,966.98
Making a total of		.....	$105,774.35

And the Washington County Railroad Company, as it was authorized to do by the above-recited acts, tendered, delivered, and paid to the comptroller of the State of Texas, in payment of interest then due on its aforesaid indebtedness to the State of Texas, in the treasury warrants of the State of Texas, the sum $12,755.41 on the 11th day of July, 1864, and the sum of $2,790.99 on the 25th day of August, 1864, and the sum of $3,880.80 on the 11th day of May, 1865, making a total of $19,427.20, and on the principal of its aforesaid indebtedness to the State of Texas the sum of $27,663.00 on the 11th day of May, 1865, each of which sums so tendered, paid, and delivered in such treasury warrants by the Houston & Texas Central Railway Company and by the Washington County Railroad Company respectively, as aforesaid, were received and accepted by the comptroller and treasurer of the State of Texas, as they were authorized and required by the above-recited acts to do, and credit therefor was then and there duly given to said Houston & Texas Central Railway Company and to the said Washington County Railroad Company respectively by the said comptroller and treasurer upon the books of their respective departments.

18 That upon the payment of the treasury warrants by said railway companies and receipt thereof by the comptroller and treasurer, as aforesaid, the said warrants were cancelled, as authorized and required by the above-recited acts, and thereupon the comptroller and treasurer, as required by the above-recited acts, issued the bonds of the State, bearing 6 per cent. interest, to the special school fund for the amounts so paid by said railway companies in such treasury warrants.

10. This defendant further says that by the passage of the above-recited acts, entitled respectively "An act authorizing the comptroller of the State to receive from the railroad companies in this State the interest that *they* may now be due on their bonds," approved December 16th, 1863, and "An act amending an act authorizing the comptroller of the State to receive from railroad companies in this State the interest that *they* may now be due or hereafter become due on their bonds," approved May 28th, 1864, and "An act to authorize railroad companies to discharge their indebtedness to the special school fund with the treasury warrants and bonds and coupons of the State," approved November 16th, 1864, for the purpose of paying its current expenses and to induce them to acquire such treasury warrants for a valuable consideration and in lieu of money for freight and passenger fares, thereby aiding in maintaining its credit, the State of Texas contracted and agreed with the said Houston & Texas Central Railway Company and with the Washington County Railroad Company respectively to accept and receive from them upon the terms and conditions in said acts specified and on said account the treasury warrants of said State paid to the the comptroller and treasurer of the State by said railroad companies on account of the principal and interest due upon said school-fund loan, as hereinbefore alleged, and upon the acceptance of the terms and conditions of said acts by each of said railroad companies by acquiring for a valuable consideration and by receiving the State

bonds and the State treasury warrants at par with specie for
19 freight and passenger fares at the rate established by law and
by satisfying the comptroller of the State that they had done so, as hereinbefore alleged, said acts immediately became and there was created a valid and binding contract by and between the State of Texas and each of said railway companies, inuring to the benefit of this defendant, that the State of Texas would receive, as it did receive, from each of said railway companies the treasury warrants of said State paid to it by each of said railway companies, as hereinbefore alleged, on account of the interest and principal due by them respectively upon said school fund loan, and would give, as it did at the time give, to each of said railway companies credit for the amount so paid in such warrants by them respectively upon principal and interest due upon said loan, as hereinbefore alleged, which contract, this defendant says, was within and in all respects is entitled to the protection of article I, section X, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts.

11. This defendant further says that the said treasury warrants paid by said railway companies, as hereinbefore alleged, on account of the principal and interest due by them respectively on their said indebtedness to the State of Texas for said school fund loan were made by them in good faith and accepted by the said State through its duly authorized officers without objection as valid and lawful payments, and for which said railway companies were entitled and for which they were given credit upon the books of the State of Texas, in pursuance of valid laws passed by said State in the exercise of its sovereign power and as then actually in force and observed in Texas, to which said railway companies and all persons residing or being within its territory were subject, and according to the laws of said State as then existing and expounded by the courts in all departments of the State government and as enforced
by it and as then actually in force and observed in Texas
20 each of such payments in such treasury warrants were, when made, lawful and valid, and were made by said railway companies and willingly accepted by the State of Texas as lawful and valid and without any objection or question, and when such treasury warrants were acquired and received by said railroad companies, as hereinbefore alleged, and by them paid to and received by the State of Texas without objection as just and lawful payments upon said indebtedness of said railway companies to said State and credit therefor was duly given by the State to said railroad companies the transaction with respect to such payments became fully executed and the State of Texas could not lawfully thereafter, as it never should in good conscience, dispute or question the validity of such payments and the right of said railway companies to the credit therefor then given by the State of Texas and to which said railway companies were lawfully and justly entitled.

And this defendant further says that the State of Texas, by denying the said Houston & Texas Central Railway Company and the said Washington County Railroad Company credit for the amounts

paid by each of them respectively, as hereinbefore alleged, in treasury warrants of the State of Texas on account of their said indebtedness and by recharging said companies with the amount so paid by them respectively in treasury warrants and cancelling the credit theretofore given by it to them for such payments and by thus seeking to deprive this defendant of the benefit of all such payments and by seeking to subject the property of this defendant to the payment of such demand after it has once been paid and satisfied, seeks to deprive this defendant of its property without due process of law, and denies to this defendant the equal protection of the laws, contrary to article XIV of the amendments to the Constitution of the United States.

And this defendant says, furthermore, that the State of Texas has since said demands were made and since the close of said
21 civil war fully recognized and ratified the validity of such payments; that it has paid in full the bonds issued by the comptroller and treasurer to the special school fund for and in lieu of said payments made by said railway companies to and received by the State in the treasury warrants, as hereinbefore alleged, and the said school fund has been thereby fully reimbursed for such payments so made in said warrants.

12. That by an act of the legislature of the State of Texas entitled "An act regulating the collection of debts," approved November 10, 1886, it was enacted, among other things, that all railroad companies then owing interest upon their bonds for loan of the special school fund should have an extension of time for the payment of the interest then due as follows: The entire amount of interest then due should be divided into eight equal parts and paid as follows in specie: One equal part to be paid on or before the first day of January, 1867, and one equal eighth part every six months thereafter until the entire amount should be paid.

13. That after the close of said civil war, in 1865, and before the first day of May, 1870, the Houston & Texas Central Railway Company paid and the State of Texas received in lawful money of the United States on account of interest due by it to the State of Texas on its aforesaid indebtedness for said school fund loan the following:

On December 31, 1866,	the	sum	of	$2,855.00
On January 1, 1867,	"	"	"	3,375.00
On April 23, 1867,	"	"	"	10,830.00
On May 4, 1867,	"	"	"	10,500.00
On May 24, 1867,	"	"	"	4,500.00
On December 31, 1867,	"	"	"	6,230.00

And the Washington County Railroad Company, on account of interest due by it on its said indebtedness to the State of
22 Texas, paid to and the State of Texas accepted in lawful money of the United States, on January 1st, 1867, the sum of $317.98, each and all of which payments made as aforesaid were received and accepted by the State of Texas as and on the accounts made as aforesaid, and credit therefor was duly given by said State to said railway companies.

14. That by an act of the legislature of the State of Texas entitled "An act for the relief of railroad companies indebted to the State for loans from the special school fund," approved August 13, 1870, it was, among other things, enacted that any railroad company then indebted to the State for loans from the special school fund might avoid the sale of its railroad for the non-payment of principal or interest by the payment into the treasury of the State on the first day of November, 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, 1870, and by the payment, in addition, on said first day of November of one per cent. upon said aggregate amount, to be applied towards the sinking fund provided for by then existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest and one per cent. on account of said sinking fund semi-annually thereafter on the first day of May and November in each year, and also that the State of Texas would not exact of any railroad company not thereafter in default in respect to any of the payments required in said act the payment of the principal of the debt of said company, except said payment on account of the sinking fund, as aforesaid, but that any company might pay the same in full at any time on thirty days' notice to the governor, and that the lien or mortgage in favor of the State securing such debt should not attach to any extension of its existing road thereafter constructed by any of said companies.

15. That on the 15 day of August, 1870, the legislature
23 of the State of Texas passed, notwithstanding the veto thereof by the governor, in the manner and by the number of votes required by the constitution in order that the same should become a law, an act entitled "An act for the relief of the Houston & Texas Central Railway Company," whereby, among other things, it was enacted that the Washington County Railroad Company should thereby be made and declared to be to all intents and purposes in law a part of the Houston & Texas Central Railway Company, and should be under the control and management of the Houston & Texas Central Railway Company in like manner as every other part of said railway, and said Houston & Texas Central Railway Company should have the right to complete and extend that part of its railway theretofore known as the Washington County railroad from Brenham to the city of Austin, and should have and enjoy all the rights, privileges, grants, and benefits that were then or should at any time thereafter be secured to any railroad company in the State of Texas by any general law, etc.; and it was also by said act provided that for the whole amount of principal and interest due to the State by the Houston & Texas Central Railway Company and the Washington County Railroad Company on the 1st day of July, 1870, the governor of the State should accept and receive from the Houston & Texas Central Railway Company the 7 per cent. land-grant, sinking-fund, first-mortgage, gold, interest-bearing bonds of said company issued or to be issued by virtue of a deed of trust executed by said company July 1,

1866, and maturing on July 1st, 1891, and — which deed of trust Shephard Knapp and David S. Dodge, of New York, were named and accepted as trustees, and provided, further, that the governor should, after making the exchange of bonds in said act provided for, cancel and deliver to said railway company the six per cent. bonds of the Houston & Texas Central Railway Company and of the Washigton County Railroad Company then held by the State for sums borrowed from the school fund (being the same bonds now sued on by the State herein), and providing also that the settlement and exchange of bonds therein provided for should be made
24 at any time agreed upon by the governor and said railway company prior to the first day of December, 1870, and also that in making the settlement therein provided for the Houston & Texas Central Railway Company should be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865 by said company and by the Washington County Railroad Company upon the accounts of which said sums were respectively paid by said companies, and that said sums amounted in the aggregate to $152,864.55.

And this defendant says that the 7 per cent. bonds which said act required the governor to receive from said Houston & Texas Central Railway Company in exchange for the bonds of said railway company and of the Washington County Railroad Company then held by the State for sums borrowed from the school fund were duly and properly tendered by said railway company to the governor, as it was authorized to do by the said act prior to the first day of December, 1870, but the then governor, E. J. Davis, refused to accept said bonds so tendered and refused to surrender and deliver or permit to be surrendered and delivered to said Houston & Texas Central Railway Company, as it was his duty to do under the aforesaid act, the bonds of said Houston & Texas Central Railway Company and of the Washington County Railroad Company then held by the State for sums borrowed by them from the said special school fund, and said governor wilfully and wrongfully refused to perform the duties enjoined upon and required of him by the aforesaid act.

But this defendant says, nevertheless, that said act entitled "An act for the relief of the Houston & Texas Central Railway Company" became and was a valid law of the State of Texas, and that thereby the State of Texas expressly recognized and acknowledged the validity of the payments theretofore made by said Houston & Texas Central Railway Company and said Washington County Railroad Company in treasury warrants of the State of Texas, as hereinbefore alleged, on account of their respective indebtedness for said school fund loan.

25 16. This defendant further says that the aggregate amount due by said Houston & Texas Central Railway Company on account of said loan, principal and interest, as said aggregate amount stood on the 1st day of May, 1870, and as said aggregate amount stood upon the books of the State of Texas after crediting said railway company, as was done on said books, with the amounts paid,

as aforesaid, in State treasury warrants, was $551,550, being $432,000, principal, and $119,550, interest, instead of $657,324.35, as charged in plaintiff's petition herein. And the aggregate amount due by said Washington County Railroad Company on account of said loan, principal and interest, as said aggregate amount stood on the first day of May, 1870, and as said aggregate amount stood upon the books of the State of Texas after crediting said railroad company as was done on said books with the amounts paid as aforesaid in State treasury warrants, was only $48,497.17, and not the sum of $103,840.01, as alleged in plaintiff's petition herein.

17. This defendant further says that after the first day of May, 1870, and after the passage of the aforesaid acts of August 13th and 15th, 1870, and on, to wit, about the first day of November, 1870, A. Bledsoe, comptroller, with the concurrence and approval of E. J. Davis, the then governor of the State of Texas, wrongfully and unlawfully sought to deprive the said railway companies of the credit to which they were entitled for the payments made by them as hereinbefore alleged on their said indebtedness in treasury warrants of the State, and wrongfully sought to repudiate such payments; and, in pursuance of such wrongful and unlawful purpose, said A. Bledsoe, as such comptroller, wrongfully and without any authority of law sought to recharge each of said railway companies, respectively, upon the books of the comptroller's office with the several amounts paid by them, respectively, in treasury warrants, as hereinbefore alleged, thereby falsely stating the amount of said indebtedness due by said Houston & Texas Central Railway Company on May 1st,
26 1870, at $657,324.35 instead of $551,550, which last-named sum was the true aggregate amount as it stood on the first day of May, 1870, and falsely stating the amount of said indebtedness due by the Washington County Railroad Company on May 1st, 1870, at $103,840.01 instead of $49,800, which latter sum was the true aggregate amount of said indebtedness as it stood on the first day of May, 1870; and thereupon said E. J. Davis, as such governor, wrongfully and without lawful authority, demanded that said Houston & Texas Central Railway Company should pay on the 1st day of November, 1870, six months' interest and one per cent. as a sinking fund on $657,324.35 instead of on only $551,550, which latter sum was the aggregate amount of its indebtedness as said aggregate amount stood on the first day of May, 1870, and that the Washington County Railroad Company should pay six months' interest and one per cent. as a sinking fund on $103,840.01 instead of on only $49,800, which latter was the aggregate amount of its indebtedness as said aggregate amount stood on the first day of May, 1870, and that they should continue to pay into the treasury of the State six months' interest and one per cent. on account of said sinking fund semi-annually thereafter on the first day of May and November in each year, and upon the refusal of said railway companies to comply with said wrongful and unlawful demands of said comptroller and governor, the said E. J. Davis, as governor, threatened to proceed and was in fact proceeding to advertise and sell, in the manner provided

in the aforesaid act of August 13th, 1856, and of August 13th, 1870, all the railroad property and franchises of each of the said railway companies on which a lien had been created to secure the payment of the aforesaid loans to them; and the said governor being, by the aforesaid act, apparently clothed with the power to make such sale, and thereby irreparably injure each of said companies by casting a cloud upon the title to their property, and probably by having the same taken from them by force, and being without adequate relief against such uniust action of the State of Texas, through its said gov-
27 ernor, said railway companies were forced to yield and compelled to submit to his unjust and unlawful demands as aforesaid, and to pay the amount then demanded by him. Such unjust and unlawful demand, accompanied with like threats, coercion, and duress, was repeated by said governor and by his successors on or about the first day of May and November in each year during the times hereinafter alleged, and said Houston & Texas Central Railway Company, in obedience to such unjust and unlawful demands, threats, and coercion, has been forced and compelled by the State of Texas to pay a two per cent. per annum sinking fund and six per cent. interest upon a computed aggregate amount wrongfully claimed as aforesaid by the State of Texas to be due by the Houston & Texas Central Railway Company on the first day of May, 1870, of $657,324.35, instead of $551,550, the true amount, and a two per cent. per annum sinking fund and a six per cent. per annum interest on a computed aggregate amount claimed by the State of Texas to be due by the Washington County Railroad Company of $103,840.01 instead of $49,800, the just and true amount, and said railway companies each protested throughout and at the time of each payment filed its written protest with the proper officers of the State of Texas against the unlawful demand and exactions aforesaid, and submitted thereto only because the governors of said State threatened and declared their purpose to sell the property of said railway companies to satisfy the lien claimed to secure the indebtedness of said companies to the State of Texas and to seize and take from said railway companies their said railroads and property, and this defendant says that such threat and purpose would have been carried into effect by said State had not said railway companies submitted to such unjust and unlawful demands.

18. This defendant further says that in obedience to the unjust, unauthorized, and unlawful demand of the State of Texas, as hereinbefore alleged, said Houston & Texas Central Railway Company was compelled to pay on account of the aforesaid indebted-
28 ness, and did under protest, as hereinbefore alleged, pay to the State of Texas the several sums of money on or about the several dates specified in the statement attached hereto, marked "Exhibit A," and which this defendant asks to be taken as a part hereof with the same effect as though set forth at length herein, which payments were the 6 per cent. interest and 2 per cent. per annum sinking fund upon a computed aggregate amount due as of May 1st, 1870, of $657,324.35 instead of $551,550, the true amount of the indebtedness of said railway company to the State of Texas

on the first day of May, 1870; and this defendant now here pleads each of such payments so shown and avers that they are in full satisfaction and discharge of any and all indebtedness of the Houston & Texas Central Railway Company or of this defendant on account of said school fund loan and on account of the demand asserted by plaintiff's petition herein, and neither said Houston & Texas Central Railway Company nor this defendant is indebted or liable to the State of Texas, nor is the railroad or other property of this defendant in any way bound or charged with any lien or liability to the State of Texas for or on account of such loan.

19. This defendant further says that in obedience to the unjust, unauthorized, and unlawful demand of the State of Texas, as hereinbefore alleged, said Washington County Railroad Company or the Houston & Texas Central Railway Company, with which it was consolidated, was compelled to pay, on account of the aforesaid indebtedness, and did, under protest, as hereinbefore alleged, pay to the State of Texas the several sums of money on or about the several dates specified in the statement attached hereto and marked "Exhibit B," and which this defendant asks to be taken as a part hereof with the same effect as though set forth at length herein, which payments were 6 per cent. interest and two per cent. per annum as a sinking fund upon a computed aggregate amount due as of May 1st, 1870, of $103,840.01 instead of $49,800, the true
29 amount of the indebtedness of said railway company to the State of Texas on the first day of May, 1870; and this defendant now here pleads each of such payments so shown, and avers that they are more than sufficient to fully pay off and satisfy and are $5,231.65 in excess of any amount which the State of Texas had any right to demand or exact on account of said loan or debt and on account of said school fund loan and on account of the demand asserted by plaintiff's petition herein, and neither said Washington County Railroad Company nor said Houston & Texas Central Railway Company, with which it was consolidated, as hereinbefore alleged, nor this defendant is indebted or liable to the State of Texas, nor is the railroad or other property of this defendant in any way bound or charged with any lien or liability to the State of Texas for or on account of said loan.

20. That as and when each of such payments were made by said railway companies, as hereinbefore alleged and as shown by said Exhibits A & B, the same should have applied, by reason of the facts hereinbefore alleged, to the payment of the 6 per cent. interest and a sinking fund on an aggregate indebtedness of the Houston & Texas Central Railway Company on account of said loan, as such aggregate indebtedness stood on May 1st, 1870, of $551,550 and no more, and to the payment of 6 per cent. interest and a sinking fund on an aggregate indebtedness of the Washington County Railroad Company on account of said loan as such aggregate indebtedness stood on May 1st, 1870, of $49,800 and no more, and this defendant is entitled to have said payments (if they have not been already) so applied, and by such equitable application this defendant says that the indebtedness of the Washington County Railroad Company

to the State of Texas was more than discharged, as shown by Exhibit B hereto attached, by the payment therein shown to have been made on the 1st day of May, 1870, and the indebtedness of the Houston & Texas Central Railway Company on account of
30 said loan was more than discharged by the payment shown in exhibit to have been made on Nov. 9th, 1893.

21. This defendant further says that the road-bed, track, franchise, and charter rights and other property of the said Washington County Railroad Company and of the Houston & Texas Central Railway Company, which prior thereto had acquired by purchase or consolidation said Washington County railroad described in plaintiff's petition and on which plaintiff claims a lien in said petition, were sold under certain decrees of foreclosure and orders of sale rendered by the circuit court of the United States in and for the eastern district of Texas and purchased by F. P. Olcott on or about the 8th day of September, 1888, who thereafter, as authorized by the laws of the State, organized this defendant under the general laws of Texas, and conveyed to it all said property and rights, and by such sale and purchase this defendant acquired and now owns all lines of railway described in plaintiff's petition and on which it claims and seeks to foreclose a lien herein, together with the corporate rights, franchises, and privileges of said Houston & Texas Central Railway Company and of said Washington County Railroad Company, and possesses, operates, and maintains such lines of railway, with the extensions thereof and additions thereto since made, and is entitled to exercise and enjoy such corporate rights, franchises, privileges, and immunities.

22. This defendant says that by reason of all the facts hereinbefore alleged, the payment of such treasury warrants by said railway companies in accordance with the valid laws of the State then existing and actually in force in the State of Texas and as recognized and enforced by all departments of the State; the acceptance of such warrants willingly and without objection by the State and the giving of credit therefor at the time by the State upon its books; the enjoyment of all the benefit of such payments
31 by the State as fully as if the same had been made in lawful money of the United States; the extinguishment of the valid and just indebtedness of the State represented by said warrants by the cancellation of the same when received as such payments, and the full acquiescence and concurrence of the State at the time and for a long time thereafter in all the facts and circumstances attending such payments, as hereinbefore alleged, represent completed and executed transactions with respect to such payments which this defendant says that the State of Texas cannot now lawfully and should not in good conscience attempt to repudiate. The State of Texas, by denying credit for the amounts paid by said railway companies, as hereinbefore alleged, in treasury warrants and by recharging said companies with the amounts so paid by them respectively, and cancelling the credit theretofore given by it to them for such payments, and by thus seeking to deprive this defendant of the benefit of all such payments, and by seeking to

subject the property of this defendant to the payment of such demands after it has once been paid and satisfied, seeks to deprive this defendant of its property without due process of law, and denies to this defendant the equal protection of the laws, contrary to article XIV of the amendments to the Constitution of the United States.

23. This defendant further says that by the passage of the acts hereinbefore referred to, and especially by the passage of the acts entitled "An act authorizing the comptroller of the State to receive from the railroad companies in this State the interest that may now be due on their bonds," approved December 16th, 1863, and an act entitled "An act amending an act authorizing the comptroller of the State to receive from railroad companies in this State the interest that *they* may now be due or hereafter become due on their bonds," approved May 28th, 1864, and an act entitled "An act authorizing railroad companies to discharge their indebtedness to the special school fund with the
32 treasury warrants and bonds and coupons of the State," approved November 16th, 1864, and an act entitled "An act for the relief of railroad companies indebted to the State for loans from the special school fund," approved August 13th, 1870, and an act entitled "An act for the relief of the Houston & Texas Central Railway Company," passed August 15th, 1870, and by the acceptance of the provisions of said act by said Houston & Texas Central Railway Company and by said Washington County Railroad Company, and especially by accepting the treasury warrants of the State in payment of freight and passenger fares on their respective railroads at par with specie, as required by the aforesaid acts of May 28th, 1864, and November 15, 1864, there was created a valid and binding contract by and between the State of Texas, inuring to the benefit of this defendant, as the successor of said companies, and the present owner of the property against which the plaintiff seeks to enforce a lien herein, whereby the State of Texas, for the valuable consideration apparent from the transaction, agreed and bound itself to receive as it did receive from each of said railway companies the treasury warrants of said State, and which were paid to it by each of said railway companies, as hereinbefore alleged, on account of interest and principal due by them respectively upon said school fund loan, and that it would, as it did at the time, give to each of said railway companies credit for each of the amounts so paid by them, which contract, this defendant says, was within and in all respects is entitled to the protection of article I, section X, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts, and which contract, this defendant says, was, when made, valid and binding by the laws of the State of Texas as then existing and actually in force in Texas and as expounded by all and the highest authorities of the State government whose duty it was to administer them, and this defendant says that any constitutional provision, ordi-
-ance, resolution, or legislative enactment, if any there be, which
33 directly or indirectly seeks or is intended to deprive this defendant of the benefit of such payments and credits, or seeks or

is intended to authorize the State of Texas or any of its officers to violate or impair said acts or contracts, or abridge or impair any of the rights of this defendant accruing thereunder, or to recharge it with any of the payments, as hereinbefore shown, or any action of its officers or agents in any manner whatsoever in construction of such legislative enactments, or any decision by the courts of said State to the effect that this defendant is not or shall not be entitled to credit for the payments on account of said indebtedness made in treasury warrants of said State, as hereinbefore alleged, this defendant says are illegal, unauthorized, and void, and have the effect, or are intended by the State of Texas to have the effect, of impairing the aforesaid contract or contracts, and are therefore violative of and contrary to article I, section X, of the Constitution of the United States, providing in effect that no State shall pass any law impairing the obligation of contracts.

IV.

Wherefore this defendant prays judgment and that it be permitted to go hence without day and recover all costs by it in this behalf expended, and it also prays for any and all relief which it may be entitled to in law or equity; and, as in duty bound, will ever pray.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Houston & Texas Central Railroad Company, Defendant.

J. P. BLAIR, *Of Counsel.*

EXHIBIT "A."

Oct. 26, 1870		$26,292.97	
May 1, 1871		26,030.04	
	November 3, 1871	25,769.71	
34	May 7, 1872	25,512.04	
	Nov. 9, 1872	25,256.91	27,530.04 cy.
May 8, 1873		25,004.36	
Nov. 7, 1873		24,754.32	
May 7, 1874		24,506.76	
Nov. 6, 1874		24,261.70	
May 7, 1875		24,019.08	
Nov. 9, 1875		23,778.89	
May 5, 1876		23,541.09	
Nov. 6, 1876		23,305.69	
May 10, 1877		23,072.62	
Nov. 10, 1877		22,841.91	
May 10, 1878		22,613.49	
Nov. 9, 1878		22,389.36	
May 10, 1879		22,163.48	
Nov. 10, 1879		21,941.84	
May 14, 1880		21,722.42	
Nov. 9, 1880		21,505.20	
May 9, 1881		21,290.14	

Nov. 10, 1881	21,077.25	
May 8, 1882	20,866.48	
Nov. 7, 1882	20,657.81	
May 8, 1883	20,451.23	
Nov. 9, 1883	20,246.72	
Nov. 9, 1884	20,044.29	
Nov. 8, 1884	19,843.31	
May 9, 1885	19,645.37	
Nov. 9, 1885	19,448.92	
May 8, 1886	19,254.43	
Nov. 9, 1886	19,061.89	
May 7, 1887	18,871.27	
Nov. 9, 1887	18,682.56	
35 May 9, 1888	18,495.73	
Nov. 8, 1888	18,310.73	
May 8, 1889	18,130.37	
Nov. 9, 1889	17,943.68	
May 9, 1890	17,766.92	
Nov. 8, 1890	17,589.25	
May 8, 1891	17,413.36	
Nov. 9, 1891	17,239.23	
May 9, 1892	17,066.84	
Nov. 7, 1892	16,896.17	
May 8, 1893	16,727.20	
Nov. 9, 1893	2,062.68	
	$975,356.21	

EXHIBIT "B."

Nov. 1, 1870	4,142.56	
May 1, 1871	4,123.22	
Nov. 1, 1871	4,070.93	
May 1, 1872	4,030.22	
Nov. 1, 1872	3,991.96	4,349.02 cy.
May 1, 1873	3,950.03	
Nov. 1, 1873	3,910.53	
May 1, 1874	3,871.41	
Nov. 1, 1874	3,832.71	
May 1, 1875	3,794 38	
Nov. 1, 1875	3,756.43	
May 1, 1876	3,718.87	
Nov. 1, 1876	3,681.69	
May 1, 1877	3,644.86	
Nov. 1, 1877	3,608.42	
May 1, 1878	3,572.33	
Nov. 1, 1878	3,536.61	
36 May 1, 1879	3,501.24	
Making a total of	$68,738.30	

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Company. Defendant's first amended original answer. Filed May 15, 1895. Jas. P. Hart, cl'k D. C., T. Co., Tex., by E. Huppertz, deputy.

Pl'ff's 1st Supplemental Petition.

Filed November 16th, 1895.

In the District Court of Travis County, Texas, 53rd Judicial District.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY.

To the honorable district court of said district and State:

Now comes the plaintiff, The State of Texas, by M. M. Crane, its attorney general, and with leave of the court files this its first supplemental petition, in reply to defendant's first amended original answer filed herein, and for supplement says:

1. That the several counts in said defendant's first amended original answer are entirely insufficient in law and in equity, and that no defense to said action is pleaded in either of said counts; and of this it prays the judgment of the court.

M. M. CRANE,
Att'y General, Att'y for Pl'ff, The State of Texas.

And, specially excepting to defendant's first amended original answer, plaintiff says:

I. That all of paragraph 7 of defendant's first amended original answer is insufficient in this:

37 (1.) That it sets out and pleads three several acts of the legislature of the State as authority for the payment of the debts made the basis of this suit in treasury warrants, State bonds, and Confederate notes; which said acts were passed without constitutional authority and were null and void in this, that they specifically attempted to authorize the destruction and diversion of a special fund given to the State of Texas by the Federal Congress for special purposes and by previous act of the legislature set apart as the special school fund, and that the said public schools of Texas had a vested right in said fund, and that the legislature had no subsequent authority to destroy said fund.

(2.) Because, plaintiff says, said paragraph 7 of defendant's first amended original answer is insufficient in this, that said acts of the legislature therein pleaded, together with others passed at and about the same time and during the continuance of the war between the States, commonly denominated "the Rebellion," plainly show that the treasury warrants and other obligations in which it is alleged that the railroad companies were authorized to pay and in which they did pay a portion of the debts made the basis of this suit were utterly null and void for the following reasons: First, because said treasury warrants in which said payments were authorized to be made and were made were issued for the purpose of being circu-

lated as money, and were therefore utterly null and void because contrary to the provisions of the State constitution which prohibited such use of treasury notes; second, because said warrants were bills of credit emitted by the State, and therefore violative of section 10, article 1, of the Constitution of the United States; third, because the several acts plainly indicate that said treasury warrants and other obligations in which said payments were authorized to be made and were made were issued in aid of the rebellion against the Government of the United States of America, and were therefore void.

38 II. Plaintiff specially excepts to paragraph 8 of said first amended original answer for the same reasons stated in support of the preceding exception.

III. Plaintiff specially excepts to paragraph 9 of said first amended original answer and all other portions of said answer in which defendant sets up payment made in treasury warrants, for the reason that same does not state the dates and denominations of the several warrants nor for what purpose they were issued and in which said payments are alleged to have been made—that is to say, the dates of the notes, when same were issued, the amount of each, and the purpose for which they were issued, so as to enable the court to determine whether the same were valid obligations of the State of Texas or whether the same were void.

IV. Plaintiff specially excepts to paragraph 9 and all other portions of said answer in which it is alleged that the railroad companies paid to the State any part of the debt made the basis of this suit in treasury warrants, because said treasury warrants were void for the reasons stated in first special exception, and because the treasurer and comptroller and the other officers of the State government had no authority to receive payment of the special school debt in anything except lawful money of the United States of America.

V. Plaintiff specially excepts to said answer because it contains no allegation that the railroad companies complied with the terms of the statute which pretendedly authorized the officers of the State to receive said treasury warrants in payment of its debt, in that it does not allege that the warrants so paid to the State or any part thereof or any other warrants of like character were by them received in payment of freight and passenger fares, as said acts of the legislature contemplated.

VI. Plaintiff specially excepts to that portion of said answer which undertakes to allege payment of the several sums of
39 money as interest under duress, because said portions of said answer, in connection with the remainder thereof, show that said payments now claimed to be a credit on the principal were made in satisfaction of the interest then due and demanded by the State and not in payment of the principal or any part thereof, and that said payments were voluntarily made and not made under duress.

M. M. CRANE,
Att'y Gen'l, Att'y for Pl'ff, The State of Texas.

And, answering further, plaintiff denies all and singular the allegations contained in defendant's answer aforesaid, and demands strict proof of the same.

M. M. CRANE,
Att'y Gen'l, Att'y for Pl'ff, The State of Texas.

And, for special replication to the allegations made in defendant's said first amended original answer, plaintiff says that if any payments were made in treasury warrants of the State of Texas on the indebtedness made the basis of this suit the same were made in treasury warrants of the State of Texas between January, 1864, and July, 1865; that the warrants in which said payments were made were issued for the purpose of being circulated as money and that they were circulated as money in so far as that result could be reached by the legislation of the State of Texas because it says that by acts of the legislature of 1861, page 19, it was specially provided that treasury notes of the State should be used in the payment of all debts due the State, including the special school fund; that by the act of January 10, 1862, it was provided, among other things, that all outstanding warrants should be refunded and new warrants issued therefor, as well as for all other claims due by the State, one-tenth of which new warrants should be of the denomination of one dollar and the remainder of five dollars or more each.

40 By the act of January 11, 1862, the legislature of Texas provided that treasury warrants not bearing interest should be receivable as money in the payment of office fees, including fees for patents to lands payable in the general land office, taxes and all other debts to be collected by the State or in its name, except the special taxes for the objects of paying the principal and interest of loans, and except for sinking fund and interest of the school fund loaned to the railroad companies.

By act of January 11, 1862, it was also provided that the treasurer and every other officer of the State and every officer of the counties who, according to law, "shall have received as public money treasury warrants of the State shall disburse and transfer the same as money at par, according to the laws providing for the disbursement and transfer of money." Their failure to treat warrants as money was, by the same act on the same day, made a penal offense.

By act of January 11, 1862, it was further provided that the debt incurred by the State known as the frontier debt should be liquidated in treasury warrants at par.

By act of 1863 the legislature further provided that the treasury warrants of the State should be receivable by the comptroller of the State in payment of interest that might be then or thereafter due from the railroad companies to the special school fund, provided said payment should be made before the meeting of the next legislature.

By act of the 10th legislature, May 28th, 1864, it was provided that the treasury warrants should be receivable for all public dues,

except those payable in specie by special provision of law. By other enactments the use of such treasury warrants in all transactions was encouraged.

Wherefore plaintiff says that the treasury warrants issued and circulated by reason of the foregoing provisions of the statute were issued and intended to circulate as money. They are therefore void because in contravention of the provision of the State constitution which prohibited the issuance and circulation of treasury warrants as money. Wherefore plaintiff says that the same were void for the further reason that they were bills of credit emitted by the State in contravention of the provisions of section 10, article 1, of the Federal Constitution.

41 Wherefore plaintiff prays that the defendant be allowed no credit by reason of its pretended payments, and that it have judgment as prayed for in its original petition.

M. M. CRANE,
Att'y Gen'l, Att'y for Pl'ff, The State of Texas.

Replying further to defendant's said amended original answer, plaintiff says that if the payments were made in treasury warrants on the debt herein sued on that no credit therefor should be allowed the defendant herein, for the reason that said treasury warrants were void in this, that they were issued between the years 1860 and 1865; that most, if not all, of them were issued after 1862 and before July, 1865; that they were issued while the State was in rebellion against the Federal Government, and that they were issued in compliance with a general plan to aid the State in the prosecution of the war of rebellion against the Federal Government, because plaintiff says that the State of Texas was greatly embarrassed in its financial affairs during the period of the war of the rebellion, and that in order to further the cause in which it was engaged, to wit, the prosecution of the war, that as a matter of governmental policy it determined to issue treasury notes to meet all of the expenses of the State government, among which were the payment of soldiers in the field and the furnishing of supplies, arms, and munitions of war.

Plaintiff would show that by act of the legislature of 1862 the issuance of treasury warrants was authorized in payment of any claim for which an appropriation had been or should be made, said act being passed on the 10th day of January, 1862.

That on the 8th day of February, 1862, the legislature, by an appropriate enactment, appropriated the sum of one hundred and fifty thousand dollars or so much thereof as might be necessary as a hospital fund, to be drawn from the treasury by warrants issued by the comptroller and signed by the governor, which were indeed treasury warrants; that this fund was set apart and appropriated to establish and maintain a hospital for the benefit of the sick

42 and wounded soldiers of the State of Texas then in the Confederate army.

That on the 11th day of January, 1862, the legislature appropriated the sum of five thousand dollars or so much thereof as might

be necessary to enable the military board therein provided for to purchase arms and munitions for the manufacture of ordinances for the military defense of the State.

That on the 14th day of January, 1862, the legislature appropriated the sum of one million dollars or so much thereof as might be necessary for military purposes—that is, for the support, comfort, and efficiency of State troops called into active service, for the purchase of arms and munitions of war of all kinds that might be necessary and proper, for the manufacture of such arms and munitions and the purchase in any market of the materials therefor, for procuring necessary armories and other places for storing public military property, for the preservation, care, and use of said property, for stationary works of defense and nautical vessels and instruments, if necessary, for the necessary maintenance of troops along the interior frontier under the law for its defense, and for all necessary and proper incidents for the foregoing military purposes; and for the purpose of carrying into effect that provision all of the specie and treasury notes which might come into the State treasury from all sources, with a few exceptions therein named, were set apart for that purpose.

Plaintiff would further show that on various other occasions during the war and before the warrants in question were issued the legislature of the State of Texas appropriated large sums of money to aid in the prosecution of the war, and that the amount of money actually on hand by the said State of Texas was very small; that deficiencies were constantly occurring in all of these items, and that treasury warrants were issued therefor.

Plaintiff would further show that the legislature at various times and dates made provisions and appropriations for the support
43 and maintenance of soldiers and their families, which said soldiers were engaged in the war of the rebellion, and in so doing debts were created, and owing to deficiencies existing in the State treasury it became necessary to issue warrants therefor.

Plaintiff would further show that if any part of the indebtedness here sued upon was ever paid in warrants, as defendant alleges, that same *were* paid with those issued in whole or in part to aid in carrying on the war and for maintaining the rebellion against the constituted authorities of the United States of America.

Wherefore plaintiff says that same are utterly null and void, and that the defendant should not be allowed a credit for the same nor any part thereof; and as to all of which it puts itself upon the country.

M. M. CRANE,
Att'y Gen'l, Att'y for Pl'ff. The State of Texas.

By way of further replication plaintiff says that the defendant should not be allowed any credit by reason of any payments in treasury warrants as alleged by it, because it says that at the time said payments were made, if any such were made, said treasury warrants were almost worthless; that they had no market value, and that said railroad companies could purchase them

and procure them in the markets for a nominal, insignificant, and trifling sum, and that the State in issuing them for the purchase of any commodity was compelled to negotiate them at greatly depreciated prices; that said railroad companies had acquired them for almost nothing; if they paid them to the State at all, compelled the State to accept them at their par value; that as soon as peace was restored that the acceptance of the said depreciated warrants in payment of said debt justly owing and due by the said railroad companies was immediately repudiated by the lawful officers of the State of Texas, and that ever since said date the State has maintained that said payments were illegal and unlawful, of which said fact the de-
44 fendant company had ample and abundant notice.

The premises considered, plaintiff prays that the defendant be allowed no credit by reason of its said pretended payments, and that upon a final hearing hereof plaintiff have judgment for its debt, interest, and costs of suit, as prayed for in its original petition. It further prays for all such legal and equitable relief as it may show itself entitled to, whether general or special.

M. M. CRANE,
Attorney General, Attorney for the State of Texas.

Endorsed: No. 11915. State of Texas *vs.* Houston & Texas Central R'y Co. Plaintiff's first supplemental petition. Filed Nov. 16th, 1895. Jas. P. Hart, clerk.

Order on Application to Remove Cause to U. S. Circuit Court, December 4th, 1895.

THE STATE OF TEXAS
vs.
H. & T. C. R. R. COMPANY. } 11915.

And now, on this the 27th day of November, 1895, came on to be heard the petition of the defendant, The Houston & Texas Central Railroad Company, accompanied by bond, the sureties on which the court finds sufficient, and after hearing argument of counsel for both parties thereon the court took said matter under advisement until this 4th day of December, 1895, when, on further consideration—

It is ordered and adjudged by the court that defendant's said petition be denied and its application to remove this cause into the United States circuit court be, and it is hereby, refused; to which action and ruling of the court defendant, by its counsel, excepts.

45 *Def't's Bill of Exceptions No.* 1.

Filed December 4th, 1895.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL R. R. Co. } No. 11915.

Be it remembered that in the above numbered and entitled cause, on the 16th day of November, 1895, the defendant filed and in due

time presented to this court its petition and bond for the removal of said cause into the United States circuit court; which petition and bond are as follows, to wit:

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

To the judge of the fifty-third judicial district in and for Travis county, Texas:

Your petitioner, Houston & Texas Central Railroad Company, respectfully represents that it is the defendant in the above styled and numbered cause, pending in this honorable court; that the said cause is a suit of a civil nature, and the matter and amount in dispute therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and that the said suit and the controversy therein involved arises under the Constitution and laws of the United States, as fully appears from plaintiff's own statement of its claim as contained in its petition, hereinafter more particularly referred to.

46 Petitioner further represents that the suit was commenced by the State of Texas, as plaintiff, against petitioner, as defendant, in this honorable court on the 8th day of December, 1894, upon which date the plaintiff filed its original petition in this honorable court praying judgment against petitioner as defendant for the sum of $86,655.90, with 6 per cent. interest thereon, payable semi-annually, from the first day of May, 1879, to the commencement of said suit, with legal interest on said interest from the time the same was payable, alleged to be the balance due upon certain bonds in said petition described, and therein alleged to have been made, executed, and delivered by the Washington County Railroad Company to the plaintiff for a part of the special school fund of the State of Texas, alleged to have been loaned the said railroad company, and praying judgment against defendant also for the sum of $411,935.84, with 6 per cent. interest thereon, payable semi-annually, from the first day of May, 1894, to the commencement of said suit, with legal interest on said interest from the time same was payable, alleged to be the balance due upon certain bonds in said petition described, and therein alleged to have been made, executed, and delivered by the Houston & Texas Central Railway Company to the plaintiff for a part of the special school fund of the State of Texas, alleged to have been loaned the said railway company, and praying the foreclosure of a lien alleged in said petition upon the railroad and property of petitioner in said petition described, which plaintiff alleged in effect defendant had acquired from said Houston & Texas Central Railway Company, subject to the plaintiff's said lien. Petitioner avers that it did not in any way appear from plaintiff's statement of its own claim in said petition, and did not elsewhere in and

by said petition in any manner appear, that the said suit was one arising under the Constitution or laws of the United States or treaties made under their authority, but the character of said suit
47 and the parties thereto and the effect of the averments of said petition were as hereinbefore alleged and not otherwise. Petitioner refers to plaintiff's said original petition now on file in said cause, and prays that the same be taken and considered as a part and in support hereof with the same effect as if set forth at length herein.

Petitioner alleges that on the said 8th day of December, 1894, upon the filing of plaintiff's said original petition, citation duly issued in said cause to and was served upon petitioner as defendant therein, in obedience to which petitioner as such defendant was required under the laws of the State of Texas to answer the said original petition of plaintiff on the 8th day of January, 1895, and, being so required, petitioner as such defendant did in said cause, on the 7th day of January, 1895, file its original answer to the plaintiff's said petition, and to its said original answer now on file in said cause petitioner now refers and prays that the same be taken and considered as a part and in support hereof, as far as the same may be material, with the same effect as if it were set forth at length herein; and thereafter, on the 15th day of May, 1895, petitioner as said defendant, as authorized by the laws of the State of Texas and with leave of this honorable court, filed in said cause its first amended original answer in lieu of and as a substitute for its original answer aforesaid, and to its said first amended original answer now on file in said cause petitioner now refers and prays that the same be taken and considered as a part and in support hereof, as far as the same may be material, with the same effect as if it were set forth at length herein.

Petitioner avers that in and by both its original answer and its first amended original answer it pleaded specifically and in manner and form required by the laws of the State of Texas and by the rules governing the practice and procedure of this honorable court the payment and satisfaction in full of plaintiff's claim
48 and demand sued on in said cause long prior to the commencement of the said suit and the extinguishment and satisfaction thereby of the lien upon petitioner's property alleged in plaintiff's said original petition and sought to be foreclosed in said suit, and, by reason of such payments, denied that either petitioner, The Houston & Texas Central Railway Company, or the Washington County Railroad Company was indebted to plaintiff in any sum whatsoever, or that plaintiff had any lien upon petitioner's property in said petition described or referred to; that among the payments upon the bonds of the Houston & Texas Central Railway Company and alleged indebtedness of that company described in plaintiff's said original petition and specially pleaded by petitioner in its said original answer and in its said first amended original answer was the sum of $23,466.76 paid on January 20th, 1864; $6,670.00 paid on March 30th, 1864; $19,009.92 paid on April 19th, 1864; $31,660.69 paid on July 13th, 1864; $2,000.00 paid on

August 20th, 1864, and $22.966.98 paid on August 24th, 1864, making a total of $105,774.35 paid by the Houston & Texas Central Railway Company to plaintiff, as authorized by the valid laws of the State of Texas then in force, in the treasury warrants of the State of Texas theretofore duly executed by said State and on the several dates when the same were paid, as aforesaid, *consisting* valid obligations of the said State, and among the payments upon the bonds of the Washington County Railroad Company and alleged indebtedness of that company or of the Houston & Texas Central Railway Company described in plaintiff 's said original petition specially pleaded by petitioner in said original answer and its said first amended original answer was the sum of $12,755.41 paid on the 11th day of July, 1864; the sum of $2,790.99 paid on the 25th day of August, 1864; the sum of $3,880.80 paid on the 11th day of May, 1865, and the sum of $27,663.00 also on the 11th day of May, 1865, making a total of $49,090.20 paid by the said Washington County Railroad Company to plaintiff, as authorized by the valid
49 laws of the State of Texas, in treasury warrants of the State of Texas theretofore duly executed by said State and on the several dates when the same were paid, as aforesaid, constituting valid obligations of the said State.

Petitioner further avers that afterward, to wit, on the 16th day of November, 1895, plaintiff in said cause, The State of Texas, with leave of this honorable court, and as it was authorized and had the right under the laws of the State of Texas and the rules governing this honorable court to do, filed its "first supplemental petition," wherein and whereby the plaintiff demurred to the said first amended original answer of petitioner, as defendant in said cause, upon the grounds, among others, and in words as follows, to wit:

(1.) "That it sets out and pleads three several acts of the legislature of the State as authority for the payment of the debts made the basis of this suit in treasury warrants, State bonds, and Confederate notes; which said acts were passed without constitutional authority and were null and void in this, that they specifically attempted to authorize the destruction and diversion of a special fund given to the State of Texas by the Federal Congress for special purposes and by previous acts of the legislature set apart as the special school fund, and that the said public schools of Texas had a vested right in said fund, and that the legislature had no subsequent authority to destroy said fund.

(2.) Because, plaintiff says, said paragraph 7 of defendant's first amended original answer is insufficient in this, that said acts of the legislature therein pleaded, together with others passed at and about the same time and during the continuance of the war between the States, commonly denominated the 'rebellion,' plainly show that the treasury warrants and other obligations in which it is alleged that the railroad companies were authorized to pay and in which they did pay a portion of the debts made the basis of this suit were utterly null and void for the following reasons:

50 First. Because said treasury warrants in which said payments were authorized to be made and were made were issued

for the purpose of being circulated as money, and were, therefore, utterly null and void because contrary to the provisions of the State constitution, which prohibited such use of treasury notes.

Second. Because said warrants were bills of credit emitted by the State and therefore violative of section 10, article 1, of the Constitution of the United States.

Third. Because the several acts plainly indicate that said treasury warrants and other obligations in which said payments were authorized to be made and were made were issued in aid of the rebellion against the Government of the United States of America, and were therefore void."

And in and by said first supplemental petition filed, as aforesaid, in said cause it was by the State of Texas alleged:

"That if any payments were made in treasury warrants of the State of Texas on the indebtedness made the basis of this suit the same were made in treasury warrants of the State of Texas between January, 1864, and July, 1865; that the warrants in which said payments were made were issued for the purpose of being circulated as money, and that they were circulated as money of the State of Texas, because it says that by Acts of the Legislature of 1861, page 19, it was specially provided that treasury notes of the State should be used in the payment of all debts due the State, including the special school fund; that by the act of January 10, 1862, it was provided, among other things, that all outstanding warrants should be refunded and new warrants issued therefor, as well as for all other claims due by the State, one-tenth of which new warrants should be of the denomination of one dollar and the remainder of five dollars or more each.

By the act of January 11, 1862, the legislature of Texas provided that treasury warrants not bearing interest should be receiv-
51 able as money in the payment of office fees, including fees for patents to lands payable in the general land office, taxes, and all other debts to be collected by the State or in its name except the special taxes for the objections of paying the principal and interest of loans and except the sinking fund and interest of the school fund loaned to the railroad companies.

By act of January 11, 1862, it was also provided that the treasurer and every other officer of the State and every officer of the counties who, according to law, 'shall have received as public money treasury warrants of the State shall disburse and transfer the same as money at par according to the laws providing for the disbursement and transfer of money.' Their failure to treat warrants as money was by the same act on the same day made a penal offence.

By an act of January 11, 1862, it was further provided that the debt incurred by the State, known as the frontier debt, should be liquidated in treasury warrants at par.

By act of 1863 the legislature further provided that the treasury warrants of the State should be receivable by the comptroller of the State in payment of interest that might be then or thereafter due from railroad companies to the special school fund, provided such

payments should be made before the meeting of the next legislature.

By act of the 10th legislature, May 28th, 1864, it was provided that the treasury warrants should be receivable for all public dues except those payable in specie by special provision of law. By other enactments the use of such treasury warrants in all transactions was encouraged.

Wherefore plaintiff says that the treasury warrants issued and circulated by reason of the foregoing provisions of the statute were issued and intended to circulate as money. They were, therefore, void because in contravention of the provision of the State
52 constitution which prohibited the issuance and circulation of treasury warrants as money. Wherefore plaintiff says that the same were void for the further reason that they were bills of credit emitted by the State in contravention of the provisions of section 10, article 1, of the Federal Constitution.

Wherefore plaintiff prays that the defendant be allowed no credit by reason of its pretended payments, and that it have judgment as prayed for in its original petition.

Replying further to defendant's said amended original answer, plaintiff says that if the payments were made in treasury warrants on the debt here sued on that no credit therefor should be allowed the defendant herein, for the reason that said treasury warrants were void in this, that they were issued between the years 1860 and 1865; that most, if not all, of them were issued after 1862 and before July, 1865; that they were issued while the State was in rebellion against the Federal Government, and that they were issued in compliance with a general plan to aid the State in the prosecution of the war of rebellion against the Federal Government, because plaintiff says that the State of Texas was greatly embarrassed in its financial affairs during the period of the war of the rebellion, and that in order to further the cause in which it was engaged, to wit, the prosecution of the war, that as a matter of governmental policy it determined to issue treasury notes to meet all the expenses of the State government, among which were the payment of soldiers in the field and the furnishing of supplies, arms, and munitions of war.

Plaintiff would show that by the act of the legislature of 1862 the issuance of treasury warrants was authorized in payment of any claim for which an appropriation had been or should be made, said act being passed on the 10th day of January, 1862.

That on the 8th day of February, 1862, the legislature, by an appropriate enactment, appropriated the sum of one hundred
53 and fifty thousand dollars, or so much thereof as might be necessary, as a hospital fund, to be drawn from the treasury by warrants issued by the comptroller and signed by the governor, which were indeed treasury warrants; that this fund was set apart and appropriated to establish and maintain a hospital for the benefit of the sick and wounded soldiers of the State of Texas then in the Confederate army.

That on the 11th day of January, 1862, the legislature appro-

priated the sum of five thousand dollars, or so much thereof as might be necessary, to enable the military board therein provided for to purchase arms and munitions for the manufacture of ordinances for the military defense of the State.

That on the 14th day of January, 1862, the legislature appropriated the sum of one million dollars, or so much thereof as might be necessary, for military purposes—that is, for the support, comfort, and efficiency of State troops called into active service—for the purchase of arms and munitions of war of all kinds that might be necessary and proper; for the manufacture of such arms and munitions and the purchase in any market of the materials therefor; for procuring necessary armories and other places for st-rong public military property; for the preservation, care, and use of said property; for stationary works of defense and nautical vessels and instruments, if necessary, for the necessary maintenance of troops along the interior frontier under the law for its defense, and for all necessary and proper incidents for the foregoing military purposes, and for the purpose of carrying into effect that provision all of the specie and treasury notes which might come into the State treasury from all sources, with a few exceptions therein named, were set apart for that purpose.

Plaintiff would further show that on various occasions during the war, before the warrants in question were issued, the legislature of the State of Texas appropriated large sums of money to aid in the prosecution of the war, and that the amount of money actually
54 on hand by the said State of Texas was very small; that deficiencies were constantly occurring in all of these items, and that treasury warrants were issued therefor.

Plaintiff would further show that the legislature at various times and dates made provisions and appropriations for the support and maintenance of soldiers and their families, which said soldiers were engaged in the war of the rebellion, and in so doing debts were created, and owing to deficiencies existing in the State treasury it became necessary to issue warrants therefor.

Plaintiff would further show that if any part of the indebtedness here sued upon was ever paid in warrants, as defendant alleges, that same were paid with those issued in whole or in part to aid in carrying on the war and for maintaining the rebellion against the constituted authorities of the United States of America, and that they were void by reason of the operation of the 14th amendment to the Federal Constitution.

Wherefore plaintiff says that same are utterly null and void, and that the defendant should not be allowed a credit for the same, nor any part thereof; and as to all of which it puts itself upon the country."

Your petitioner here refers to plaintiff's said first supplemental petition and prays that the same be taken and considered as a part and in support hereof with the same effect as if it were set forth at length herein.

Petitioner further avers that the nature and only object and purpose of said suit is to set aside and avoid the payments in the treasury

warrants of the State of Texas made, as hereinbefore alleged, by the Houston & Texas Central Railway Company and the Washington County Railroad Company, respectively, to said State on the bonds and former indebtedness described and referred to in plaintiff's original petition, upon the grounds and
55 for the reasons presented and set forth by plaintiff in its first supplemental petition hereinbefore stated and referred to, and plaintiff's right of action against petitioner, as defendant in said suit, arises, if at all, under the Constitution and laws of the United States referred to and invoked by plaintiff in its first supplemental petition above referred to and stated, and plaintiff's right of action and defendant's liability in said suit are wholly dependent upon the construction of the Constitution and laws of the United States in their effect upon and application to the issues in said suit presented for the first time by plaintiff's first supplemental petition, filed as aforesaid.

Plaintiff further avers that the only petitions or other pleadings filed in said suit by The State of Texas, the plaintiff therein, are the original petition of plaintiff, filed, as aforesaid, on the 8th day of December, 1894, and the "first supplemental petition" of plaintiff, filed, as aforesaid, on the 16th day of November, 1895; and petitioner avers that the fact that the said suit arises under the Constitution and laws of the United States did not in any way appear from plaintiff's petition or from plaintiff's statement of its own claim in any manner until the filing by plaintiff of its said first supplemental petition on the 16th day of November, 1895, as hereinbefore alleged, and until then the right of defendant to remove this cause into the circuit court of the United States upon the ground that it was and is a suit arising under the Constitution and laws of the United States or treaties made under their authority, or upon any other grounds whatsoever, did not exist.

Petitioner further avers that the said suit has never been tried and no question therein has ever been determined in or by this honorable court, but the same has been continued or passed by consent of parties, plaintiff and defendant, without trial and without ever having been called for trial, and has not been called or set for trial at the present term of this honorable court. Petitioner avers that, as defendant in said suit, it has not as yet been re-
56 quired by the laws of Texas or by any rule of this court to answer or plead to the first supplemental petition of the plaintiff in said suit, filed, as aforesaid, on the — day of ——, 1895, but, on the contrary, petitioner has the right, under the laws of the State of Texas and the rules governing this court, to answer plaintiff's said first supplemental petition at any time before the parties to said suit announced themselves ready for trial.

Your petitioner offers herewith a bond, with good and sufficient sureties, for its entering in the circuit court of the United States for the western district of Texas, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this the said suit was wrongfully or improperly removed thereto.

Wherefore petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept this petition and said bond, and to cause the record herein to be removed into said circuit court of the United States in and for the western district of Texas; and petitioner will ever pray.

J. P. BLAIR,
BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Houston & Texas Central.
Railroad Company, Petitioner.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Petition for removal. Copy. Filed Nov. 16, 1895. Jas. P. Hart, cl'k D. C., T. Co.

57 In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Know all men by these presents that the Houston & Texas Central Railroad Company, as principal, and C. Lombardi and Jas. A. Baker, Jr., as sureties, are held and stand firmly bound unto the State of Texas in the penal sum of one thousand dollars; for the payment *of* whereof, well and truly to be made unto the said State of Texas, we bind ourselves, jointly and severally, firmly by these presents.

Upon condition, nevertheless, that whereas the said Houston & Texas Central Railroad Company has petitioned the district court of the fifty-third judicial district in and for Travis county, in the State of Texas, and held therein, for the removal of a certain cause therein pending, wherein The State of Texas is plaintiff and the said Houston & Texas Central Railroad Company is defendant, into the circuit court of the United States in and for the western district of Texas:

Now, therefore, if the said Houston & Texas Central Railroad Company shall enter into the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

58 In witness whereof the said Houston & Texas Central Railroad Company and the said —— —— and —— —— have hereunto subscribed their names this the fifteenth day of November, A. D. 1895.

HOUSTON & TEXAS CENTRAL
RAILROAD COMPANY,
By BAKER, BOTTS, BAKER & LOVETT.
C. LOMBARDI.
JAS. A. BAKER, JR.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Bond for removal. Filed Nov. 16, 1895. Jas. P. Hart, cl'k D. C., T. Co.

And on consideration thereof, and while affirming the sufficiency of said bond, it was on this 4th day of December, 1895, ordered and adjudged by the court that said petition be, and the same was, denied, and said application to remove this cause as prayed in said petition was refused; to which action and ruling of the court counsel for said defendant then and there excepted, and now tenders this *their* bill of exceptions, and prays that same be allowed and filed as part of the record in this cause, and it is so ordered.

F. G. MORRIS,
Judge Presiding.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Defendant's bill of exceptions No. 1. Filed Dec. 4th, 1895. Jas. P. Hart, clerk D. C., T. C.

Plaintiff's First Amended Supplemental Petition.

Filed January 16th, 1896.

In the District Court of Travis County, Texas, 53rd Judicial District.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

59 To the honorable district court of said district and State:

Now comes the plaintiff, The State of Texas, by its attorney general, and with leave of the court files this its first amended supplemental petition, amending and correcting its first supplemental petition, filed herein on the — day of ——, 1895, and in reply to defendant's amended original answer filed herein says:

I.

That the several counts in said defendant's first amended original answer are entirely insufficient in law and equity, and that no defense to plaintiff's action is thereby interposed or pleaded in either or any of said counts; and of this it prays the judgment of the court.

M. M. CRANE,
Att'y Gen'l, Attorney for Plaintiff, The State of Texas.

II.

1. And, specially excepting, plaintiff says that all that portion of defendant's first amended original answer which pleads that the funds which were borrowed by the railroad companies from the State of Texas was the special school fund of the State of Texas set apart by the several acts of the legislature which were pleaded and

referred to by defendant, and that after having borrowed said money the acts of the legislature authorized the payment of the interest and principal thereof in treasury warrants of the State of Texas, and that the same was so paid in treasury warrants, is wholly insufficient, because, as is judicially known to the court, the treasury warrants were utterly worthless or nearly so, and the statutes authorizing the payment of the principal and interest of the said special and perpetual school fund which had been previously appropriated as a permanent fund for the support of the free
60 schools constituted a diversion of said fund to other uses than that for which it had been set apart, and therefore was in contravention of section 2, article X, of the constitution of Texas of 1845, and in contravention of section 2, article X, of the constitution of the State as amended in 1861.

2. Plaintiff excepts to all that part of said answer which sets up the payment of said debt in said treasury warrants as being utterly insufficient in this: The pleading shows that the treasury warrants relied upon were issued by the State of Texas for the purpose of being circulated as money, and that they were circulated and used by the State officers as money, and that they were therefore void because in contravention of section 8, article VII, of the constitution of the State of Texas of 1845, which prescribes that in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money, and in contravention of section 8, article VII, of the constitution of the State as amended by the convention of 1861, which prohibited the issuance of treasury warrants, treasury notes, or paper of any description intended to circulate as money.

3. Plaintiff specially excepts to all that part of said answer which sets up the payment of said indebtedness in treasury warrants, because the several acts of the legislature upon which they are based show that the same were issued with the intention of being circulated as money, and that the same were circulated and used by the State officers as money, and that therefore they are void and of no effect because issued in violation of section 10, article I, of the Constitution of the United States, which prohibits the States from emitting bills of credit or making anything but gold and silver coin a tender in payment of debts.

4. Plaintiff specially excepts to all that portion of said answer which sets up the payment of said debt in treasury warrants,
61 because the same and the acts of the legislature which authorized their issuance show that they were issued and circulated in order to aid the then authorities of the State of Texas in prosecuting a war of rebellion against the Government of the United States, and that said payments were authorized and were indeed made for the purpose of aiding the State in prosecuting the war.

5. Plaintiff specially excepts to all that portion of said answer in which payments in treasury warrants are set up, because it says that the people, in constitutional convention assembled in 1866, by ordinance declared all said warrants in which said pretended payments were made to be utterly void and of no effect, and further

because article XII, section 34, of the constitution of 1869 reiterated and repeated the same declaration. Wherefore plaintiff says that the acts of the agents of the State were then and there utterly repudiated, and that said payments, if ever effective, became utterly null and void from said date.

6. Plaintiff specially excepts to said answer for the reason that same does not show the date, the denomination, nor the purposes for which said warrants were issued in which the alleged payments were made.

Of all of which plaintiff prays the judgment of the court.

M. M. CRANE,
Att'y Gen'l, Attorney for Plaintiff, The State of Texas.

III.

And, answering, plaintiff denies all and singular the allegations contained in defendant's said answer aforesaid, and demands strict proof of the same.

M. M. CRANE,
Att'y Gen'l, Attorney for Plaintiff, The State of Texas.

62 IV.

And, for special replication to the allegations made in defendant's said first amended original answer, plaintiff says that if any payments were made in treasury warrants of the State of Texas on the indebtedness made the basis of this suit the same were made in treasury warrants of the State of Texas issued after the ordinance of secession had been passed by the State of Texas, and, indeed, after the 1st day of January, 1862, and after the act of January 10, 1862, which provided that all outstanding warrants of the State of Texas should be refunded and new warrants issued therefor, as well as for all other claims due by the State, one-tenth of which new warrants should be of the denomination of one dollar and the remainder of five dollars or more each, and plaintiff avers and here charges that if said payments were made in said warrants the defendant is entitled to no credit therefor, because *of* said treasury warrants in which said payments were pretendedly made, if made at all, were issued for the purpose of being circulated as money, and that by several acts of the legislature passed after their issuance and before said payments were made they were made and intended to be made to circulate as money, and that the several acts providing that the State authorities should receive them in payment of the interest and principal of the debt sued on were enacted and said payments received for the sole purpose of enabling the said treasury warrants to circulate as money and to create a demand therefor so as to give same some little intrinsic value.

Wherefore plaintiff says that the same were utterly void and the said payments made thereon a nullity, because the same were contrary to the provisions of the State constitution—that is to say, of section 8, article VII, of the constitution of Texas of 1845, and of section 8, article VII, of the same constitution as amended in 1861,

which declared that in no case should the legislature have the power to issue treasury warrants, treasury notes, or paper of
63 any description intended to circulate as money.

Plaintiff further avers that said payments were utterly null and void for the reasons above stated; that said paper was intended at the date of its issuance to circulate as money, and that it was the intention of the legislature in the several acts providing for its circulation and disbursement as money and for its acceptation by the State in the payment of its debt so intended to circulate it as money, and that therefore said payments were utterly void because contrary to article 1, section 10, of the Constitution of the United States, which prohibits all the States of the American Union from the emission of bills of credit and from making anything but gold and silver coin a tender for the payment of debts, because plaintiff avers that the purpose of said acts and the objects had in view by the legislature was to make the treasury notes in which said payments were made bills of credit and a legal tender for the payment of all debts due the State and a legal tender for payment of the debts due the special school fund, for which this suit is brought.

Wherefore plaintiff prays that defendant be allowed no credit by reason of said pretended payments, and that it have judgment as prayed for in its original petition.

For further special replication to defendant's said answer plaintiff says that if any payments were made in treasury warrants on the debt herein sued on no credit therefor should be allowed the defendant herein for the reason that said treasury warrants were void in this, that they were issued during the war of the rebellion—that is to say, after the State of Texas, in convention assembled, had declared its purpose of seceding from the Union and had attached itself to the Southern Confederacy; that said treasury warrants were issued while the State was in open rebellion against the United States Government; that they were issued in
64 compliance with a general plan to aid the State in the prosecution of the war of rebellion against the Federal Government, because plaintiff says that the State of Texas was greatly embarrassed in its financial affairs during the period of the war of rebellion, and that in order to further the cause in which it was engaged, to wit, the prosecution of the war, that as a matter of governmental policy it determined to issue the treasury notes to meet all of the expenses of the State government, among which were the payment of the soldiers in the field, the furnishing of supplies, arms, and munitions of war to the armies engaged in the cause of the Confederacy against the United States Government; that among other things appropriations were made to form and equip soldiers, to provide clothing and supplies for the same, to purchase and establish armories, to purchase vessels, and to do everything else that might be necessary to equip and furnish an army and navy with the munitions of war and the means of prosecuting the same; that large and vast sums of money were appropriated to establish hospitals for the sick and wounded of the Confederate

armies and to take care of and provide for the families of the Confederate soldiers who were then absent, fighting against the United States Government; that by law it was specially provided that treasury warrants should be drawn on the treasury for all such appropriations; that the depleted condition of the treasury rendered their payment by the treasury impracticable, and that therefore treasury warrants were made to circulate and did circulate and do duty as money; that the size, denominations, character, and appearance of said notes all indicated that the purpose was to have them circulate as money, and that the same were issued in order to enable the State to prosecute its purpose and to aid the Confederate States in the war of rebellion as aforesaid.

Plaintiff would further show that the warrants with which the payments were made, if any were made, were issued in whole
65 or in part to aid in carrying on the war and for maintaining a rebellion against the constituted authorities of the United States of America, and that the same were void because made so by the fourteenth amendment to the Constitution of the United States.

Wherefore plaintiff says that the same are utterly null and void, and defendant should not be allowed a credit for them nor any part thereof, and as to all of which it puts itself upon the country.

By way of further replication plaintiff says that the defendant should not be allowed any credit by reason of any payments in treasury warrants as alleged by it, because it says that at the dates said payments were made said treasury warrants were almost worthless, that they had no market value, and that said railroad companies to which the loans were made could purchase them and did so purchase them in the market for a nominal, trifling, and insignificant sum—that is to say, not exceeding 8 or 10 cents on the dollar, or for 8 or 10 cents one dollar of said warrants could be procured, and that for the most part said warrants could be procured for nothing; that said railroad companies procured them for almost nothing, and that by fraudulent conspiracy with the State officers then in charge of the governmental affairs they prevailed upon them to accept said warrants at their par or face value; that as soon as peace was restored the acceptance of said depreciated warrants in payment of said debt justly due and owing by said railroad companies was immediately repudiated by the lawful officers of the State of Texas, and that ever since that time the State has maintained that said payments were illegal and unlawful, of which said fact the defendant company had ample and abundant notice.

Premises considered, plaintiff prays that defendant be allowed no credit by reason of the pretended payments, but that if any credit be allowed defendant that it be credited only with the cash value of said warrants at the time when same were delivered to the
66 authorities of the State of Texas in payment of said debts.

Plaintiff further prays for all such legal and equitable relief as it may show itself entitled to, whether general or special.

M. M. CRANE,
Att'y Gen'l, Attorney for Plaintiff, The State of Texas.

(Endorsed:) 11915. State of Texas *vs.* H. & T. C. R. R. Co. First amended supplemental petition. Filed January 16th, 1896. Jas. P. Hart, clerk.

Def't's First Supplemental Answer.

Filed January 16th, 1896.

In the 53rd Judicial District Court in and for Travis County, at Austin.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Now comes The Houston & Texas Central Railroad Company, defendant in the above styled and numbered cause, by its attorneys, and reserving its exceptions to the action of this court in denying its application to remove this cause into the United States circuit court for the western district of Texas, and denying the jurisdiction of this court since said application for removal was presented herein, and protesting against further proceedings herein by this court, files this its first supplemental answer, by leave of court, in response to plaintiff's first amended supplemental petition herein filed on the 16th day of January, A. D. 1896, and demurs to plaintiff's said first amended supplemental petition, and
67 says the same is insufficient in law, and of this it prays judgment of the court.

II.

And, further answering herein, defendant specially excepts to the first special plea contained in said first amended supplemental petition and to so much of said first supplemental petition as alleges in effect that the treasury warrants therein referred to were void because issued in violation of the provision of the constitution of the State of Texas prohibiting the issuance of treasury warrants intended to circulate as money and because they were bills of credit emitted by the State in contravention of the provisions of section 10, article 1, of the Constitution of the United States, and as ground of exception defendant says:

(1.) That if it be true, as alleged in said petition, that said treasury warrants were issued in violation of the constitution of the State of Texas and of the Constitution of the United States, yet defendant says that they were so issued by the State of Texas, and after having been so issued the State of Texas received such treasury warrants from said railway companies in making such payment and accepted the same without apparent protest or objection, and that upon such payment and acceptance the transaction became and was immediately completed and fully executed, and the State of Texas, being the wrong-doer, is not entitled to have the same reopened and set aside in order that it may have relief against its own wrong, if there was wrong.

(2.) That if it be true, as alleged by plaintiff, that said treasury warrants were issued in violation of the constitution of the State of Texas and of the Constitution of the United States they were so issued by plaintiff, The State of Texas, and by it put in circulation among its citizens, and it cannot now take advantage of its own wrong, as it is seeking to do in and by said plea.

(3.) That if it be true, as alleged in said supplemental petition, that said treasury warrants were issued in violation of the constitution of the State of Texas and of the Constitution of the United States, and that the several acts of the legislature of the State of Texas set forth and referred to in said supplemental petition were passed to encourage the circulation of said warrants as money, defendant says that, the State of Texas having so issued said warrants and so encouraged and promoted their circulation
68 among its citizens, it is now estopped to question or deny their validity in this action, instituted in its own behalf.

(4.) That the State of Texas having issued said treasury warrants, and having by appropriate legislative enactment contracted with said railway companies and those under whom defendant claims to receive the same in payment of a part of the indebtedness to it due by the companies under which defendant claims, and having actually received such treasury warrants as such payment without protest or objection, the State of Texas cannot now repudiate its own action in the premises, and is estopped to deny the validity of the warrants so paid or the validity of said payment.

(5.) That if it be true, as alleged, that said treasury warrants were issued in violation of the constitution of the State of Texas and of the United States defendant says that the same having been so issued by the State of Texas, and also that the State of Texas received and accepted them in payment, as alleged, apparently without protest or objection, and the transaction in which said payment was made having been fully executed, the State of Texas cannot now, if it ever could, question or deny the legality of the warrants so paid or the validity of the payment so made to and accepted by the State of Texas.

And — all of this defendant prays judgment of the court.

III.

And, further answering, defendant specially excepts to the second special plea contained in said first amended supplemental
69 petition and to so much of said supplemental petition as alleges in effect that credit should not be allowed for payments made in treasury warrants, and that such treasury warrants were illegal because it is alleged that they were issued in aid of the "rebellion," and as ground of demurrer defendant says:

(1.) That if it be true, as alleged by plaintiff, that the warrants used in making the payment in question were issued in aid of the so-called "rebellion" defendant says that they were so issued by the State of Texas, and that in issuing said warrants and in contracting and agreeing with said railway companies to receive the same

and in receiving and accepting the same from them as such payment the State of Texas was and is *in pari delicto*, and is not entitled to any relief against said payment.

(2.) That if it be true, as alleged, that said treasury warrants were issued in aid of the so-called "rebellion," yet defendant says that they were so issued by the State of Texas, and after having so issued them the State of Texas received such treasury warrants from said railway companies in making such payment and accepted the same without apparent protest or objection, and that upon such payment and acceptance the transaction became and was immediately completed and fully executed, and that the State of Texas, being the wrong-doer, is not entitled to have the same reopened and set aside in order that it may have relief against its own wrong.

(3.) That if it be true, as alleged by plaintiff, that said treasury warrants were issued in aid of the so-called "rebellion" they were so issued by plaintiff, The State of Texas, and by it put in circulation among its citizens, and it cannot now take advantage of its own wrong, as it is seeking to do in and by said plea.

(4.) That if it be true, as alleged in said supplemental petition, that said treasury warrants were issued in aid of the so-called "rebellion," and that the several acts of the legislature of the State of Texas set forth and referred to in said supplemental petition were passed to encourage the circulation of said warrants as
70 money, defendant says that the State of Texas having so issued said warrants and so encouraged and promoted their circulation among its citizens, it is now estopped to question or deny their validity in this action instituted in its own behalf.

(5.) That the State of Texas having issued said treasury warrants, and having by appropriate legislative enactment contracted with defendant or those under whom defendant claims to receive the same in payment of a part of the indebtedness to it due by the companies under which defendant claims, and having actually received such treasury warrants as such payment without protest or objection, the State of Texas cannot now repudiate its own action in the premises, and is estopped to deny the validity of the warrants so paid or the validity of said payment.

(6.) That if it be true, as alleged, that said treasury warrants were issued in aid of the so-called "rebellion" defendant says that the same having been issued by the State of Texas, and also that the State of Texas received and accepted them in payment, as alleged, apparently without protest or objection, and the transaction in which said payment was made having been fully executed, the State of Texas cannot now, if it ever could, question or deny the legality of the warrants so paid or the validity of the payments so made to and accepted by the State of Texas.

And of all this defendant prays judgment of the court.

IV.

And, further answering, said defendant further excepts to the said special plea contained in said first amended supplemental petition

and to so much of said supplemental petition as alleged in effect that the said treasury warrants at the time such payments were made were practically worthless and without market value, and that such payments were repudiated by the officers of the State soon after the close of the war, and as ground for exception defendant says:

71 (1.) The market or other value of said warrants at the time such payments were made is immaterial and irrelevant to any issue in this case.

(2.) The State has no cause for complaint by reason of having paid the face value of her indebtedness.

(3.) It appears that the times when it is alleged said payments were sought to be repudiated by the officers of the State of Texas were long after such payments had been made and the transaction had been fully completed and executed.

And of this defendant prays judgment of the court.

V.

And, further answering, defendant comes, by its attorneys, and denies all and singular the allegations in plaintiff's said first amended supplemental petition contained; and of this it puts itself upon the country.

VI.

And, for further plea in this behalf, defendant comes, by its attorneys, and specially denies that, as alleged by plaintiff, the treasury warrants used in making the several payments alleged in defendant's first amended answer herein were issued for the purpose of being circulated as money or were issued in aid of the "rebellion," and defendant says, on the contrary, the warrants so used in making such payment were issued in the exercise of the powers and in the performance of the duties conferred upon the comptroller by laws in force in the State of Texas ever since its annexation, and in the ordinary transactions of the business of the government, and to pay appropriations duly made by the legislature for the ordinary and lawful expenses of the government, including payment for salaries of legislative, judicial, and executive officers, but then in excess of the revenues for the time being of the State government and above the available fund then in the State treasury.

Wherefore defendant prays judgment.

72 VII.

And for further plea in this behalf defendant says that if it be true, as alleged by plaintiff, and which defendant denies, that the treasury warrants used in making the payments in question and paid in, as set forth and pleaded in defendant's first amended original answer herein, on the indebtedness sued on, were issued in violation of the provision of the Constitution of the State of Texas prohibiting the issuance of treasury warrants intended to circulate as money, or that they were bills of credit emitted by the State, in violation of the Constitution of the United States,

or were issued in aid of the "rebellion," defendant says that they were so issued by the State of Texas and put in circulation by it among its citizens, who were induced, if not coerced, by the State to accept the same; that after contracting and agreeing with the defendant and other railway companies of the State, by the acts approved December 16th, 1863; May 24th, 1864, and November 16th, 1864, set forth in defendant's first amended original answer herein, to receive and accept said treasury warrants under the terms and conditions in said act specified, in payment of the amount due as interest and sinking fund on the school fund loan to defendant, The State of Texas, as alleged in defendant's first amended original answer herein, did receive and accept, upon the dates therein alleged, the said treasury warrants, without objection or protest, and applied the same as a payment upon the indebtedness sued on and gave defendant credit therefor upon its books in the comptroller's department, as in said amended answer alleged; that at the time said payments in treasury warrants were made to and accepted by the State of Texas and at the time the several acts of the legislature authorizing such payments were passed the State of Texas was in full exercise and enjoyment of all its governmental powers, and its laws were in force throughout its territorial limits, and all persons therein were subject thereto; that when said payments were made they
73 were in all respects valid and binding, and the transaction was legal and in accordance with the valid laws of the State then in force and with the laws then uniformly observed and enforced throughout the limits of the State of Texas and to which all persons therein were subject, and any subsequent legislation or constitutional provision which may be construed as intended to invalidate the same is contrary to the Constitution of the United States, and therefore void; that said warrants were used in making such payments at the invitation and in accordance with the wish of the State of Texas as expressed by its valid laws then in force, and received and accepted by the State of Texas as such payments willingly and without protest or objection of any kind at the time, and due credit for such payments was then and there given and allowed by the State of Texas upon its books; and defendant says that upon the tender of such warrants to the State of Texas, and the receipt and acceptance of the same by said State, and the allowance by the State upon its books of due credit therefor, the transaction in which such warrants were so paid to and accepted by the State immediately became completed and was fully executed and has ever since so remained; and defendant says that the State of Texas, being the wrong-doer, if there was wrong, is not entitled to have said completed and executed transaction reopened and set aside and relief given it against its own wrong. Wherefore defendant prays judgment.

VIII.

And, for further plea in this behalf, defendant says that if it be true, as alleged by plaintiff, but which defendant denies, that the treasury warrants used in making the payments in question were

issued in aid of the so-called "rebellion," and that for that reason the payment in them was illegal, defendant says that they were so issued, if at all, by the State of Texas; that the State of Texas encouraged and invited defendant and other railway companies of the State to use the same in making such payments, and that
74 the State of Texas received and accepted such warrants as such payment without protest or objection and allowed due credit therefor, and that therefore the State of Texas is *in pari delicto*, and, that the transaction having been fully completed and executed, the State is not entitled to any relief against such payment and cannot avoid the credits duly given and allowed by it therefor upon its books and records and dispute the same by showing its own wrongful and unlawful action.

IX.

And, for further plea in this behalf, defendant says that if it be true, as alleged by plaintiff, but which defendant denies, that the treasury warrants used in making the payments in question were issued in violation of the provision of the constitution of the State of Texas prohibiting the issuance of treasury warrants intended to circulate as money, and for that reason the payment in question was illegal, defendant says that they were so issued, if at all, by the State of Texas; that the State of Texas encouraged and invited defendant and other railway companies of the State to use the same in making such payment, and that the State of Texas received and accepted such warrants as such payments without protest or objection, and allowed defendant credit therefor, and that therefore the State is *in pari delicto*, and, the transaction having been fully completed and executed many years ago, the State is not entitled to any relief against such payments and cannot avoid the credits duly given and allowed by it therefor upon its books and records or dispute the same by showing its own wrongful and unlawful action.

X.

And, for further plea in this behalf, defendant says that if it be true, as alleged by plaintiff, but which defendant denies, that the treasury warrants used in making the payments in question were bills of credit emitted by the State in contravention of the pro-
75 visions of section 10, article 1, of the Constitution of the United States, prohibiting the issuance of treasury warrants intended to circulate as money, and that for that reason the payment in them was illegal, defendant says that they were so issued, if at all, by the State of Texas; that the State of Texas encouraged and invited defendant and other railway companies of the State to use the same in making such payments, and that the State of Texas received and accepted such warrants as such payments without protest or objection, and allowed defendant credit therefor, and that therefore the State of Texas is *in pari delicto*, and, the transaction having been fully completed and executed many years ago, the State is not entitled to any relief against such payment, and cannot avoid

the credits duly given and allowed by it therefor upon its books and records or dispute the same by showing its wrongful and unlawful action.

XI.

And, for further plea in this behalf, defendant adopts and reiterates all the allegations contained in its first amended original answer herein filed, and prays as it therein prayed.

J. P. BLAIR,
BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Houston & Texas Central Railroad Co.

(Endorsed:) No. 11915. The State of Texas *vs.* The Houston & Texas Central Railroad Co. Defendant's first supplemental answer. Filed Jan'y 16, 1896. Jas. P. Hart, clerk.

Pl'ff's 2nd Supplemental Petition.

Filed January 16th, 1896.

In Dist. Court, Travis Co., Tex., 53 Judicial Dist.

THE STATE OF TEXAS
vs.
THE H. & T. C. R. R. Co. } No. 11915.

76 To the hon. dist. court of said district:

Now, at this time, comes The State of Texas, plaintiff in the above-styled cause, and with leave of the court files this its 2nd supplemental petition, in reply to the 1st supplemental answer of the defendant, and for said 2nd supplemental petition says:

1. That each of the several counts in defendant's said first supplemental answer is wholly insufficient; that same constitutes no ground of estoppel against plaintiff and no defense to the several matters pleaded by plaintiff, and of this it prays judgment of the court.

M. M. CRANE,
Att'y Gen'l, Attorney for the State of Texas.

Answering further, plaintiff denies all and singular the allegations in said 1st supplemental answer, and demands strict proof of same.

M. M. CRANE,
Att'y Gen'l, Att'y for Pl'ff, The State of Texas.

(Endorsed:) No. 11915. The State of Texas *vs.* The H. & T. C. R. R. Co. Plaintiff's second supplemental petition. Filed January 16, 1896. Jas. P. Hart, clerk.

Defendant's Trial Amendment.

Filed January 16th, 1896.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

In Travis County District Court, 53rd Judicial District, at Austin.

Now comes Houston & Texas Central Railroad Co., by its
77 attorneys, and, reserving and not waiving its exception to the ruling of the court in sustaining the 6th special exception contained in plaintiff's first amended supplemental petition herein, files this its trial amendment, by leave of the court, and says:

That it is unable to show the date, the denomination, or the specific purposes for which issues of the various warrants used in making the payments alleged in its first amended answer herein, further than to show that all such warrants so used by it in making said payments were of the warrants which defendant was authorized to use for that purpose under the acts approved December 16, 1863, and May 28th, 1864, and November 16, 1864, set forth at length in defendant's first amended answer herein, and that they were each and all issued to pay appropriations duly made by the legislature of the State of Texas for ordinary and lawful expenses of the government, including payment for salaries of legislative, judicial, and executive officers, and defendant is unable to specify the different acts making such appropriations and under which said warrants were issued; that defendant kept no record of the date and amount of each warrant or of the particular act under which it was issued, and although it has made diligent search and inquiry, it is unable to show such facts, further than as heretofore and hereinbefore alleged by it.

Wherefore defendant prays as in its first amended and first supplemental answers herein.

J. P. BLAIR,
BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Houston & Texas Central Railroad Co.

(Endorsed:) No. 11915. The State of Texas *vs.* Houston & Texas Central R. R. Co. Defendaant's trial amendment. Filed January 16, 1896. Jas. P. Hart, clerk.

78 *Pl'ff's 3rd Supplemental Petition.*

Filed January 16th, 1896.

In District Court, Travis County, Texas, 53rd Judicial Dist.

THE STATE OF TEXAS
vs.
H. & T. C. R. R. Co.

To the hon. district court of said district:

Now, at this time, comes the plaintiff, and with leave of the court files this its third supplemental petition in reply to the trial amendment this day filed and the several pleas of which it is amendatory, and for supplement says that said trial amendment and the several pleas of which it is amendatory are each and all insufficient in this:

1. That they do not show the kind, character, date, nor amounts of each nor any of the warrants in which said pretended payments were made, nor give any other description sufficient to put the State on notice of the kind or character of proof relied upon.

2. Because no sufficient reason is given why a better description of same is not given, of all of which the plaintiff prays judgment of the court.

M. M. CRANE,
Att'y for Pl'ff, The State of Texas.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R'y Co. 3rd supplemental petition of plaintiff. Filed January 16, 1896. Jas. P. Hart, clerk.

Findings of Fact and Conclusions of Law.

Filed February 29th, 1896.

79 In District Court of Travis County, 53rd Judicial District.

THE STATE OF TEXAS
vs.
THE G., H. & S. A. R'Y Co. } # 11914.

THE STATE OF TEXAS
vs.
THE H. & T. C. R. R. Co. } # 11915.

The State instituted the above-styled suits against the railroad companies named as defendants respectively therein to recover balances amounting in the aggregate to over $900,000.00, alleged by the State to be owing by the respective railroad companies on bonds executed to the State for loans made of parts of the special school fund during the years 1857 to 1859, inclusive, under acts of the legislature of 1856.

The special school fund out of which the loans were made was created by the legislature of 1854 out of funds acquired from the United States in settlement of the boundary question between the United States in relation to the boundary between Texas and New Mexico.

The acts of 1856 authorized a loan of the special school fund to certain railroad companies, and provided for a lien to exist in favor of the State on the railroads to secure the payment of the loans, which might be enforced by the governor, who was authorized to cause a sale of a defaulting road without judicial proceedings.

The defendant railroad companies, either in their pleading or by admission made during the trial, recognized their liability for the sums sued for, unless the payments made by them in State treasury warrants in 1864 and 1865 are now to be treated as effectual payments, which they insist they must be, and the State concedes that she has no case if such payments were legal or have become binding on the State.

The objections of the State to the legality of the payments are:

80 First. That the special school fund in question was protected by the constitution of 1845 from diversion by the legislature to other than school purposes, and that a diversion was attempted when debts owing to the school fund were allowed to be paid in treasury warrants.

Second. Because the acts passed to authorize payments of these loans in treasury notes, the acts of the railroads under this legislation, and the payments made therein were in aid of the rebellion, and were, therefore, void.

Third. Because the acts in question authorizing payments in treasury warrants contemplated and attempted to aid in the use as money of treasury warrants issued to circulate as money, in violation of the State constitution forbidding the issuance of treasury warrants intended to circulate as money and of the Constitution of the United States forbidding any State to emit bills of credit.

I will take up and pass on these propositions in the order in which they are stated.

Diversion of a School Fund.

Was the acceptance of treasury warrants in payment of money loaned from the school fund an unconstitutional diversion thereof? I think not. The perpetual school fund, which the constitution of 1845 protected from diversion, was that created by setting apart not less than one-tenth of the annual revenue "derivably from taxation." As the fund which the State received from the United States Government in settlement of a boundary dispute, a part of which was by the legislature voluntarily set apart as a school fund, was not derived from taxation, the legislature was under no constitutional duty to set any part of it aside as a school fund, nor was it controlled in dealing with this fund thereafter by the constitutional restriction as to the perpetual fund. Hence the legislature had the power to repeal the act setting apart for school purposes a portion

of the fund received from the United States, or to divert the
81 fund thus set aside to the payment of the ordinary expenses of the government.

In Aid of the Rebellion.

The next question is, Were the laws passed providing for the payment of this debt in State treasury warrants and the acts of the railroad companies thereunder in aid of the rebellion, and therefore void, or were these payments made in warrants issued in aid of the rebellion, and for that reason void?

In passing upon this question there is no room for the exercise of any independent judgment as to what the course of judicial opinion since the war ought to have been upon this line of questions. The decisions of the Supreme Court of the United States, which are binding upon State courts on this subject, have settled the rules of law which must be applied to this case, and we are left to apply them to the particular cases in hand. Laws passed or contracts made in aid of the rebellion are deemed by that court to be in violation of the Constitution of the United States, and hence a controversy such as this raises a Federal question, in treating of which the decisions of the United States Supreme Court are of controlling authority. Hananer *v.* Woodruff, 15 Wall., 439.

Two general propositions on this subject are well settled.

The first one is stated by the Supreme Court of the United States in the case of Horn *v.* Lockhart, 84 U. S., 570, as follows: "The acts of the several States in their individual capacities and of their different departments of government—executive, judicial, and legislative—during the war, so long as they did not impair or tend to impair the supremacy of the national authority or the just rights of citizens under the Constitution, are in general to be treated as valid and binding."

Second. That contracts or laws made in aid of the rebellion were void and not subject to be ratified. Texas *vs.* White, 7 Wall., 700; Thomas *v.* City of Richmond, 12 Wall., 349.

82 The acts authorizing payments by the railroads in treasury warrants of their indebtedness to the school fund were as follows:

Act of December 16, 1863.

SEC. 1. The comptroller of the State be and he is hereby authorized to receive from railroad companies in this State, who are indebted to the special school fund, all interest on their bonds that may now be or hereafter become due; provided the same is tendered in State bonds, or in State treasury warrants, previous to the meeting of the next regular session of the State legislature.

SEC. 2. For all sums so paid in, the comptroller and treasurer shall issue to the special school fund the bonds of the State, bearing six per cent. interest.

Act of May 28, 1864, *Amendatory of the Last-mentioned Act.*

SEC. 1. The provisions of the act of which this is amendatory, shall not apply to railroad companies that fail or refuse to receive State bonds or State treasury warrants at par for freight or passage at the prices of rates established by law. Sections 2 and 3 provide for furnishing satisfactory evidence to the comptroller of such refusal and require the posting of notices of the terms of the act under penalty, but no provision of the law required the railroad companies to accept bonds or treasury warrants at par in payment of freight and passenger charges.

Act of November 15, 1864.

SEC. 1. The railroad companies of this State that are indebted to the special school fund shall continue to be allowed the privilege of paying the interest due said fund in the treasury warrants and bonds and coupons of the State, and may also discharge the whole or any part of the principal of their indebtedness to that fund in the same manner provided such railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par, with specie for freight and passenger travel.

83 Sec. 2 provided for cancellation of bonds or warrants received and issuance of State bonds to the school fund.

There is nothing on the face of these statutes indicating an unlawful purpose or effect, but while we may not hear evidence as to the motives of the legislature or look elsewhere than to the acts of the legislature itself and to the public history of the country to determine the purpose and effect of legislation, yet we are not confined to a consideration of these laws alone in passing on their meaning and effect. They deal with State bonds and warrants and express only a part of the legislative mind on those subjects. In order to determine their purpose and effect we must look to preceding legislation of which these acts are a part. It was said in Henderson *v.* Wickham, mayor, 92 U. S., 259, that "in whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect."

In Texas *v.* White the United States Supreme Court construed an act of the Texas legislature repealing a law restricting the sale of United States bonds owned by the State in connection with a cotemporaneous act creating a military board, and authorizing it to sell such bonds, and from this act and the history of the times found the purpose in repealing the restrictions on sales of bonds to be to facilitate their sale to raise funds to carry on the war, and held the repealing act void. The same court in the case of Thomas *vs.* City of Richmond, 12 Wall., accepted a finding of the lower court that a law of Virginia was passed in aid of the rebellion, though the act itself expressed no such purpose; and

again in Taylor *vs.* Thomas, 22 Wall., 479, that court held a statute of Mississippi, which authorized the issuance of treasury notes in 1861, to have been passed in aid of the rebellion, though no such purpose was expressed on its face. The last-mentioned case was brought up by writ of error from the supreme court of Mississippi.

The United States Supreme Court in stating the grounds of
84 the decision of the court below, which were adopted by the United States Supreme Court, said:

"Most of the propositions submitted by the respondents were examined by the State appellate court, in all or nearly all of which the court appear to have concurred, but they finally rested the decision upon the ground that the alleged contract of the insurrectionary legislature that the treasury notes to be issued under the act in question should be received in payment of taxes was void, because the act conferring the authority to issue the notes was passed in aid of the late rebellion, and consequently that the supposed contract is not obligatory upon the State, since she returned to her allegiance and became reorganized under the Federal Constitution; that the operation and effect of that act was to give aid and comfort to the rebellion, and therefore that it was not revived by the ordinance of reorganization passed since the cessation of hostilities; that the act was a part of the financial system of the State at a time of great pecuniary want to supply not only a circulating medium for the people in the transaction of their ordinary business, but also to furnish means by which an empty treasury might be replenished; that the treasury notes issued under that act were also intended to supply an important part of the revenue by which State government was to be sustained and enabled more effectually to aid the Confederate government in the prosecution of a sanguinary war waged expressly for the purpose of subverting the Constitution of the United States. Beyond all doubt," says the court, "the finding of the appellate court of the State is correct."

In the light of these authorities, as well as upon general principles, I have no doubt but that in prosecuting the inquiry as to the purpose and effect of the statutes authorizing payments of indebtedness to the school fund in State treasury warrants I must take into consid-
eration the history of the times, the past legislative acts, and es-
85 pecially those in relation to treasury warrants and State bonds which are the subjects of the act in question. If this were not the rule, the valid enactment and enforcement of unconstitutional legislation might be easily accomplished by the adoption in separate acts of fragmentary provisions over a subject in such manner that no separate fragment of the legislation would disclose any unconstitutional purpose or effect, whereas, when viewed as a whole, a manifest violation of the constitution would appear. I shall view all the financial legislation of the State which preceded those enactments in connection with them in order to discover their effect and purpose, for, as said by the United States Supreme Court, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

Let us look, then, to what had preceded the legislation in question.

It is useless to recite the attempted secession of the State from the Union, the ejection from their offices of the State officers who would not recognize the legality of secession, and the reorganization of the State government upon a plane of recognition of effectual secession from the Federal Union and the attempt to maintain this status by aiding what must now be accepted at least for all purposes of judicial decisions as a rebellion against the Government, Constitution, and laws of the United States. Those facts of history are fresh in the minds of all. Keeping in view this status of the *de facto* State government, let us refer to some financial legislation which had preceded the enactments in question.

In 1862 the legislature appropriated $1,000,000 for military defense (Acts '62, p. 52), another $1,000,000 in bonds was set aside for military defenses during the same year (Acts '62, p. 55), and $50,000 was appropriated as a hospital fund to take care of disabled Texans in the Confederate army, relating mainly, if not altogether, to those who might thereafter become disabled in war. In
1863 $150,000 was appropriated for the expenses of a military
86 board in order to enable them to provide for the sinking fund and interest on the war-loan bonds issued under the act of 1861, (Acts '63, p. 8); $150,000 more was appropriated as a hospital fund for the sick and wounded Texans in the Confederate army (Acts '63, p. 11). On March 5, 1863, the sum of $600,000 was appropriated for the support of the widows and families and dependencies of officers and soldiers of Texas who have been or may be in the army of the Confederate States or militia volunteer service of the State (Acts '63, p. 13).

Other appropriations for military purposes—that is, war purposes—as contradistinguished from frontier defense, in the language of legislation, amounting to over $1,500,000.00 were made.

At the same time large appropriations were made for the support of the civil government, and appropriations for large amounts made prior to the war for legitimate purposes were not met except by the issuance of warrants, which were still unpaid at and after the beginning of the war.

Millions of dollars of warrants were drawn and to be drawn against the treasury under these appropriations. The treasury was empty and warrants drawn under those appropriations would not be paid in lawful money. It was contemplated that other appropriations for support of the civil government and for carrying on the war must be made, and financial expedients had to be resorted to to make State warrants as valuable as possible, as they or State bonds were all the State could use in making payments. There was no separate financial system for appreciating the price of warrants issued for the civil service. The legislation intended to make warrants acceptable to those from whom the State would obtain services and supplies to support the civil government also comprehended enhancing the value of warrants already issued and to be issued to pay for supplies, services of men, and munitions of war in aid of the rebellion.

The act of April 18, 1861, authorized the borrowing of money to pay debts created by the secession convention.

87 Three acts were passed January 11, 1862, one to provide for the receipt of treasury warrants not bearing interest and Confederate notes for all public dues, with two exceptions. The second required the treasurer and all State and county officers to disburse treasury warrants and Confederate notes as money, and the third authorized the issuance and sale of State bonds and the application of such bonds or the proceeds thereof to the payment of indebtedness theretofore incurred by the State for civil and war purposes and to the payment of future indebtedness that might be incurred in support of the civil government or for the military defense of the State government. This act was amendatory of certain sections of the act of April 8, 1861, authorizing the issuance and sale of bonds.

By another act of January 13, 1862, it was provided that any indebtedness of the State to the special funds should be substituted as far as practicable by "loan bonds," as the bonds above mentioned were termed.

On December 10, 1863, an act was passed providing for the borrowing of two millions of dollars, or so much thereof as might be necessary, upon bonds payable in cotton, expressly referring to the war, and stating the purpose to be to raise funds for defense of the State in that war.

On May 28, 1864, the same day on which the act was passed limiting the right to pay interest on school fund indebtedness in treasury warrants to those railroads who would accept treasury warrants and State bonds at par for carrying services, the legislature passed an act to provide for the liquidation of debts incurred in support of the civil department, and to liquidate appropriations which have been made or may be made by the Tenth Legislature for the support "of families and other dependents of Texas officers and soldiers in military service of the State and

88 of the Confederate States of America." Now, however commendable provision for the support of destitute families of soldiers may have been, and no difference how much such provisions may appeal to our sympathies, it cannot be doubted that this was as much in aid of the rebellion as was the furnishing of supplies to the soldiers themselves. The same may be said of appropriations for hospitals at an earlier date.

The foregoing sketch of some of the legislation leading up to the passage of the act of December 16, 1863, and of May 28th, 1864, and November 10, 1864, authorizing the payment of the debt owing to the school fund by the railroad companies in State treasury warrants, will be sufficient to show how the latter acts and the action taken under them operated in aid of the rebellion. These acts were simply a part of a financial scheme to enhance the value of State warrants so as to enable the State not only to support the civil government, which it might lawfully do, but to utilize its State warrants to purchase and pay for supplies and munitions of war; and not only do these acts include the double purpose of supplying the

civil government and supporting the rebellion, but the contract which each railroad entered into to receive State treasury warrants, whether issued for civil or military purposes at par in payment of freight and passenger charges, was a contract made in aid of the rebellion. Thus by making such contracts they became direct supporters of the financial scheme of the government to provide for the purchasing of arms and munitions of war.

The railroad companies were voluntarily parties to this financial plan. They were not bound to pay anything on their indebtedness to the school fund after January 11, 1862, until six months after the close of the war. On that day the legislature passed an act relieving them from such payments until six months after the close of the war. And while they would probably have received a large number of treasury warrants in payment of freight and passenger fares
89 for want of other currency in the hands of the people with which to pay for such services without any contract with the State, yet they would not have received them at par, but at their depreciated value, and their agreement to receive them at par, in order to be able to make payments with them on their indebtedness to the State, was not forced on them. The statute prescribed a penalty for failure to post notices of its terms, but did not require acceptance of treasury notes, except as a condition of paying them on the roads' indebtedness, and the penalty for failure to post its terms was imposed simply to cause notice to be brought to the comptroller of their refusal, if they did refuse, to take the State's paper at par, so that the comptroller might refuse to allow them to make payments in treasury warrants on their indebtedness to the school fund.

The voluntary contractual relations thus assumed by the railroad companies with the State to aid in appreciating the value, not only of warrants issued for civil service, but of warrants issued and to be issued in support of the rebellion, was illegal, and no right to pay in any kind of warrants which were acquired under such contracts existed, nor were payments made in such warrants effectual as payments for any purpose.

Similar questions to the one now under consideration have come before the courts of last resort of the Southern States since the war. As late as 1887 the validity of treasury warrants issued by the State of Arkansas under an ordinance entitled "An ordinance to provide revenue for the State of Arkansas" came up for decision. It was contended in that case in support of the warrants that nothing appeared in the act to suggest that warrants issued under that ordinance were for illegal purposes. The court in reply to this contention said: "But can the treasury warrants be separated from the war bonds so far as their receivability for future taxes is concerned? Are not both parts of one general scheme? These interrogatories were answered in the affirmative, and the warrants were held to be void." Bragg *vs.* Tuffts, 49 Ark.,
90 554.

The supreme court of Mississippi passed on an act of the legislature of that State passed December 9, 1863, authorizing the payment in treasury warrants of all the indebtedness owing by railroads

to the school fund of that State, which fund there, as here, had been loaned to railroad companies prior to the war. There, as here, the validity of the act authorizing such payments come in question in a suit for the debt wherein the payments were disregarded as void. There was nothing on the face of the act indicating an unlawful purpose, but the court said:

"It must be assumed as a truth which enforced itself upon the understanding that there must have been some extraordinary motive that induced the legislature of 1863 to invite the railroad companies to pay into the treasury this large indebtedness (loaned in coin or its equivalent) in a currency then depreciated 400, 500, or 600 per cent. below coin standard." A history of legislation and appropriations to carry on the war is then recited by the court, and from these facts and the history of the times the inference is drawn that this act was passed in aid of the rebellion and the payments in treasury warrants were disallowed without any effort to inquire whether some of them may not have been issued for lawful purposes. N. O., etc., Co. *v.* The State, 52 Miss., 877.

Another decision by the Supreme Court of the United States in point is the case of Hananer *v.* Doane, 12 Wall., 342. The court, speaking of those who become the holders of due bills, knowing that they had been issued by a contractor for supplies received by him, to be furnished to the Confederate army, said: "They became the holders of due bills, knowing for what purpose and on what consideration they had been issued, and hence their title was no better than — of the original holders. To vitiate this title it was not necessary, as stated by the judge, that Hunter & Oates should have been interested in furnishing the supplies for which the due bills were given, nor that what they did should have been done
91 with the view of aiding the rebel cause."

The analogy between that case and the one at bar is sufficiently close to make the application of the principles there announced to these cases apparent. Here the railroad companies contract with the hostile government to take at par, among other evidences of indebtedness, treasury warrants issued for aid furnished by others to the carrying on of the rebellion. The contract is made in consideration of the agreement by the State, through a legislative act, to redeem the treasury warrants by cancelling indebtedness owed by the railroad companies to the State on delivery of the warrants taken at par by the railroad companies. The contract is carried out and the benefit of it is claimed in these cases.

In another case what seems to be the very question here involved was decided adversely to the defendant's contention. The case referred to is Taylor *v.* Thomas, 89 U. S., 479, from which I have before quoted. In that case it appeared that the State of Mississippi on December 19, 1861, passed an act authorizing the issuance of treasury notes to the amount of $5,000,000, to be paid out of the treasury of the State as advances to the people of the State upon cotton. The State was to receive the cotton, have a lien upon it, sell it to pay the advances, and place the money received for the cotton in the State treasury in payment of the ad-

vances made in treasury notes. In consideration of the people accepting the treasury notes for cotton, it was enacted that the treasury notes so issued should be receivable in payment of all dues to the State. Taylor had delivered cotton to the State, and obtained the treasury notes therefor, which at a later period he tendered in payment of taxes. The collector refused to accept the notes and was proceeding to enforce the payment of the taxes of Taylor in lawful money when Taylor sued for an injunction upon the ground that a contract existed between him and the State requiring the State to so receive treasury notes in payment of taxes, the obligation
92 of which was impaired by subsequent legislation seeking to deny him the right to use such treasury warrants in payment of taxes. It was contended by counsel for Taylor that the act under which the cotton notes were issued was an act of ordinary legislation, having no reference whatever to the rebellion. But the United States Supreme Court looked beyond the face of the act to the fact that the act, while aiding the civil government, also furnished means with which to carry on the war, and held the act and the contract of the State with Taylor to receive the treasury notes void.

It is impossible to render valid void contracts and enactments in aid of the rebellion by so blending them with legal contracts and valid laws as to render it impossible to eliminate the illegal from the legal parts. The result of such confusion of illegal with legal purposes and effects, according to well-recognized rules, is to render the whole void. It was so held in the case of Hananer *v.* Doane, quoted from. There a part of the consideration for the notes sued on was legal, but a part was illegal, and the court said, "If either of these portions of the consideration on which the notes were given was illegal, the notes are void in toto. Such is the elementary rule for which it is unnecessary to cite authorities." A part of the treasury warrants which the railroads agreed to take at par in consideration of the State receiving them in payment of debts owing by the railroads to the State were legal, but a part of such consideration was illegal, and as that which was legal cannot be separated from that which was illegal, the whole contract falls to the ground.

And the railroads acquired no right to pay in any kind of warrants which may have been received as the fruit of this unlawful contract, whether some of the warrants thus received may have been issued for legal purposes or not, and the State officials had no power to bind the State by accepting payments sought to be made under such unlawful contract. The contract undoubtedly obli-
93 gated the railroad companies to receive all warrants offered them, including those issued directly in aid of the war.

There is a clear distinction between the class of cases which deal with transactions between individuals involving the use of Confederate money or State treasury warrants, concerning which several authorities have been invoked by defendants, and contracts and transactions with a hostile State. The indirect benefit which the State or the Confederate government received in the way of appreciation of government paper by individuals treating it as money in

their ordinary business transactions did not render private contracts respecting such paper void. Such contracts were upheld because made through necessity amounting to force, but the question is quite different when one voluntarily deals with the hostile government in such manner as to aid it in the rebellion or when a State passes a legislative act with a view to aiding it to assist the Confederacy in carrying on the rebellion. The former class of contracts are valid, but the latter class of contracts and statutes were void and have been uniformly decided by the courts to be void.

It will be seen from the foregoing authorities and the line of reasoning which they support that it must be held that the acts attempting to authorize the payments in question were void in so far as they applied to warrants issued in aid of the rebellion, and that as the aid they were intended to give to warrants generally was made to operate in aid of warrants issued in support of the rebellion by reason of the general connected and inseverable financial scheme of which they were a part, the acts are void in toto and did not confer any authority upon the State officers to receive payments in treasury warrants on the debt owing by the railroad companies to the school fund.

It must also be held, as I have indicated, that because the railroad companies acquired them under a contract to take them at par in aid of the rebellion they did not acquire any right to make
94 effectual legal payments to the State with them, even if they might have so used them if they had acquired them in the ordinary course of business without any contract with the hostile State in relation thereto.

But if we assume that the statutes in question, though void as to warrants issued for military purposes connected with the war, were valid as to warrants issued for civil purposes, what must be the disposition of the payments in question? The defendant railroad companies take the position that if they might have paid in legal warrants the presumption is that they did pay in legal warrants, and that the burden of proof is upon the State to show that the payments were made in illegal warrants. I do not think this position tenable for several reasons. In the first place, the rule is that when one pleads payments in something other than money it devolves on him to plead, describe, and prove the very kind of paper or articles in which he paid. If the defendants had discharged this burden they would have shown, in making out their case, the very warrants in which they paid, and their legality or illegality would have been apparent without proof on the part of the State when the laws of which the court must take judicial notice were applied to the case. But the defendants have simply pleaded and proved that they made payments in treasury warrants, and they are unable to prove and the State is unable to prove what kind of warrants were used in such payments. The warrants were received by the railroad companies as money indiscriminately and were received by the State officials in the same manner, and no record was taken or kept of the various classes of warrants that might have been used. It is not probable that the ability of either the State or the railroads

to produce evidence as to the class of warrants in which payments were made has been effected by the lapse of time or death of former officials. Probably neither party could have remembered an hour after a payment, if they ever knew, the act class of warrants in
95 which they were made, any more than a man making or receiving a large payment in paper currency now would remember what part of it was paid in the different kinds of paper money now in circulation.

It is certain that there were a large number of warrants issued directly in aid of the rebellion which they received at par under the State laws in order to be able to pay their debts to the State in State warrants at all, and it appears just as probable that they made the payments in part in that class of warrants as in others. If we were not bound to take notice of the fact that they must have had illegal warrants with which they might have paid, the case would not be so strong for the State. But under the facts they should be held to prove not only that they paid in some kind of State warrants, but there being both legal and illegal State warrants, it devolved on them to prove what kind of warrants they paid in, so that the court might see whether they were legal or illegal warrants.

For another reason the burden of proof is upon the defendants on this question. This is not a suit by the State to set aside payments, as defendants contend. Payments accepted through mistake or imposed through fraud might not be void but merely voidable and binding until set aside, and a party to be relieved from them would have to assume the burden of proving the avoiding facts. But void payments do not have to be set aside; they may be ignored. The State, in this case, ignores the payments in question as void, and the defendants are forced to plead and try to sustain them. Not only this, but the defendants are asking equitable relief to set aside the application of payments heretofore made. They have repaid to the State, under protest, the amount of the payments made in treasury warrants, and, without a change in the application made of the payments, what they owe now is on the remaining part of the debt which is incontestible. They must, therefore, seek to set aside the application of payments hereto-
96 fore made, and to have those payments applied to the balance of their respective debts remaining, after considering the payments in treasury warrants as valid. In their pleadings they allege that this requirement of payments upon the basis of ignoring payments made in treasury warrants was illegal, and that they assented to the application which was made of their payments only under protest, and pray for a re-application of payments. In other words, they have to resort to a cross-action to set aside the application heretofore made of payments. Then they have the burden of proving that the first payments made in treasury warrants were legal in order to show the exaction of a second payment of the amounts paid in treasury warrants was unauthorized.

But the defendants say the presumption in favor of the regularity of official acts requires us to presume that officials charged with receiving these payments received none but legal warrants. The

presumption of the regularity of official acts proceeds upon the assumption that executive officers regard all legislative acts passed in due form as constitutional until decided by the judicial department to be unconstitutional. The presumption, therefore, is that in 1864 the executive officers of the government regarded the statutes authorizing payments to be made in any kind of treasury warrants as valid, and that therefore they did not discriminate in receiving such warrants, so as to reject what are now classed as illegal because issued in aid of the rebellion. That is not only a presumption, but history proves it to be a fact. The court must take judicial notice of the historic facts that in 1864 the offices of this State were occupied by men who believed the State had legally seceded from the Federal Union and who acted on the assumption that no laws in aid of the war were void, as being against the laws of a government with which they believed they had severed their connection and to which they believed they no longer owed any allegiance or duty.

97 They did not think of acts in aid of the rebellion, for to their minds there was no rebellion, but a lawful secession from the Union. To their minds acts in aid of the war were acts in defense of one's country against a war of conquest waged by alien enemies. They not only did not seek to avoid such official acts as would aid in the war, but each with his whole heart and soul did everything, in an official way, that he could do to make successful what he regarded as a war of defense of his country, and such would it have been held, for all legal purposes in this State, if it had been successful. The presumption contended for by defendants, though supported by general propositions of law, is in this case overcome not only by the presumption that those organizing a government in hostility to the United States and outside of the Union, as they believed, would not hold legislation of their State unconstitutional because it might be hostile to the Constitution and Government of the United States, but the facts of history do not leave the question open to presumption. The court judicially knows that they generally treated warrants issued in aid of the rebellion as valid. Presumptions of fact cannot be indulged in against the public history of the country proving the contrary.

It is safe to assume that if the men who received for the State the payments in question were now living they would regard it as an imputation of treason to ask them to testify that they attempted to discriminate against warrants issued in aid of the Southern Confederacy. Nearly all of the participants in behalf of the South yet deny that there was a rebellion, and maintain the opinion that there was a justifiable legal secession from the Union. The question must forever remain open, in the forum of independent individual opinion, whether that position was correct, and it is no purpose of mine to give a personal opinion that the view maintained by the South was or was not erroneous. For all purposes of judicial decisions the question has long since been concluded against the views of the South, and I am not at liberty to depart from the judicial decisions on that subject while passing on the question as

a court, nor do I seek to evade the full logical consequences
98 of the prevailing course of judicial opinion on this subject.

I hold that the alleged payments in State treasury warrants were ineffectual for any purpose for the reasons which I have given.

Treasury Warrants to Circulate as Money.

Bills of credit.

The next objection to the payments in treasury warrants is that the acts authorizing such payments were void because they attempted to aid in giving effect to legislation providing for the issuance of treasury warrants to circulate as money in violation of the State constitution forbidding the issuance of treasury warrants for such purposes, and in violation of the Constitution of the United States, which forbids any State to emit "bills of credit."

In the case of Craig *v.* The State of Missouri, 4 Peters, 410, the Supreme Court of the United States, speaking through Chief Justice Marshall, defined bills of credit as follows:

"The term has acquired an appropriate meaning, and 'bills of credit' signify a paper medium intended to circulate between individuals and between government and individuals for the ordinary purposes of society."

In another part of the opinion the court, in commenting upon the evidences that the certificates which the State of Missouri issued bore of bills of credit, said: "It seems impossible to doubt the intention of the legislature in passing this act or to mistake the character of those certificates or the office they were to perform. The denominations of the bills—from ten dollars to fifty cents—fitted them for the purpose of ordinary circulation, and their reception in payment of taxes and debts to the government and to corporations, and of salaries and fees, would given them currency. They were to be put into circulation—that is, emitted by the government."

Let us apply to the legislative acts under consideration
99 this definition and reasoning as well as the prohibition in the State constitution against the issuance of treasury warrants to circulate as money.

The act of February 14, 1860, which provid*ing* for treasury warrants to bear interest, and that they should "not circulate as money," but might be assigned, was expressly repealed January 10, 1862, by an act which provided for funding interest-bearing warrants in non-interest-bearing warrants, and for dividing up the amount of the interest-bearing warrants or other claims into new warrants of such denominations as the person to whom they were issued might desire, with the proviso that "not more than one-tenth of the whole amount may be issued in warrants for one dollar each, and the balance in warrants for five dollars or more each." Prior to the passage of this act an act had been passed requiring the receiving by the comptroller of treasury warrants "for money" in settlement with any individual indebted to the State for lands under the different pre-emp-

tion laws or laws authorizing the sale of university lands, or laws providing for the sale of public domain.

On January 11, 1862, an act was passed which expressly provided that non-interest-bearing treasury warrants shall be receivable as money in the payment of office fees, including fees for patents and land dues payable in the general land office, taxes, and all other dues to be collected for the State or in its name, except specific taxes for the objects of paying interest and principal of loans, and except dues of sinking fund and interest on school funds loaned to railroad companies. On the same day another act was passed providing "that the treasurer and every other officer of the State and every officer of counties who, according to law, shall have received as public money treasury warrants of this State, or treasury notes of the Confederate States of America, or its coupons shall disburse or transfer the same as money at par, according to the laws providing
100 for disbursement or transfer of money in the respective cases" where they would be received as money, "except that treasury warrants of the State received by the treasurer thereof shall not be reissued." After this come the acts in question, authorizing the payment of the school fund in treasury warrants in which the State provided for a bargain with railroad companies to receive treasury warrants at par in payment of charges for carrying services rendered individuals as well as the State. It requires no argument to show that it was the purpose of this legislation to cause treasury warrants to circulate as money, and public history informs us they did circulate as money.

The defendants insist that the treasury notes were not "bills of credit," which a State is forbidden to issue, and cites the case of Poindexter *vs.* Greenhow, 114 U. S., 270, where the Supreme Court of the United States held that coupon bonds of the State of Virginia were not to be classed as bills of credit because they were made receivable for taxes; but that case is not in point. The court there held that the coupons were not intended to circulate as money and find the evidences of a lack of such intention, among which the court mentions a conclusive circumstance in the following language: "They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all." The treasury warrants we are considering were due when issued and were receivable for public dues and were to be disbursed as money by all public officers after they were so received unless they were paid into the State treasury. The language of the statutes speak- of their being used as money, and leave- no chance for doubt on that subject. The acts providing for their use in payment of indebtedness to the school fund contemplate their circulation as money, and that they will in the ordinary course of business be tendered to the railroad companies to
101 pay for carrying services, and looks to maintaining them as money by making provision for their being accepted at par. Counsel for defendants take the position that if warrants are issued by the State against appropriations to pay debts incurred by the

State they cannot be bills of credit or be issued in violation of the State constitution forbidding their issue to be circulated as money. I cannot concur in this view. If any State should embark in the issuance of bills of credit or warrants intended to circulate as money, its only expedient means of getting them out into circulation would be by passing them in payment of expenses incurred by the State.

As the treasury warrants used in making the contested payments were issued in violation of the State constitution and of the Constitution of the United States forbidding the issuance of treasury warrants to circulate as money or were endowed with such unconstitutional function after they were issued, the acts of the legislature attempting to authorize their use as money by providing for contracting with railroad companies to receive them as money at par and authorizing them to pay their debts to the State with them as money were void because intended to aid in circulating such papers as money. These acts were therefore ineffectual to authorize the payments in question.

The same construction ought to be given to the scope of those constitutional provisions as that given by the Supreme Court of the United States to a law of the State of Tennessee forbidding private banks issuing any bills or notes for the purpose of putting into operation any banking institution, association, or concern. The court said:

"We must construe the act, therefore, as covering with its penal prohibition the whole range of devices by which illegitimate currency is imposed on the community. It prohibits the use of such currency during the whole period of the establishment of an
102 illegal company, and applied as completely to the last as to the first step of its operations. Any other construction would frustrate the legislative intent and leave the great mischief which the statute was made to prevent wholly without restraint or check." Davidson *v.* Lanier, 4 Wall., 447.

If valid payments may be made to the State in paper issued unlawfully as money, then effect will be given to the unlawful issue, and the prohibitions of the State and United States Constitutions would be of no avail.

Although payments made by one citizen to another in such unlawful paper, made under the coercion of war, which deprived the people of all other circulating mediums, are held valid when accepted, yet a different rule must be applied to payments to the State which issues the paper and makes its claims payable in it as a direct and intended means of inducing it to circulate as money. Payments to the State must be treated as void, or there would be no means of stopping the circulation of such paper as money, and the constitutions would be imperative.

The proposition of defendant, based upon the concession, for the purposes of their argument, that the payments may have been illegal when made, but have become binding on the State, first, because the transaction is fully executed, and the State, being *in pari delicto*, cannot reopen it; second, because the State is estopped by its con-

duct, and because it has acquiesced a long while in what was done and been guilty of laches; third, because it has recognized and affirmed the payments by the legislation of 1870, may each and all be answered with the proposition that if the act of 1864, authorizing the payments, were unconstitutional and void for the reasons that they were passed in aid of the rebellion or to assist the State in emitting bills of credit or circulating treasury warrants as
103 money, any act of the subsequent State legislature or State officers, under the same or even more stringent constitutional restrictions, which looked to their being given effect by conduct of State officials or by direct sanction of the legislature, would also be void and of no binding force upon the State. Such acts would not be the acts of the State, but lawless acts of a State government. When State officers have no power to directly bind the State by their acts, they cannot do so indirectly; and while the State only acts by agents and may be bound indirectly under the doctrine of estoppel by the acts of its agents who have power to bind the State directly, yet when State officers act outside of their constitutional authority their acts are in no sense the acts of the State and cannot be so treated for the purposes of affecting the rights of the State in court. This is no more than an application of the elementary rules of agency to the question, for if one appoints an agent and delegates to him certain powers and the agent exceeds those powers, every one will agree that the unauthorized acts of the agent do not bind the principal; and while the principal may in person adopt and ratify the unauthorized acts of this agent or appoint other agents with powers extensive enough to cover ratification of *piror* unauthorized acts and become bound by a ratification of such acts, yet no subsequent agent with no more power than the former agent who was guilty of the unauthorized acts could any more make the act binding on the principal by attempting to ratify it in the name of the principal than the first agent could bind the principal by the unauthorized act in the first instance.

The Supreme Court of the United States expresses this proposition in the following language in the case of Poindexter *v.* Greenhow, 114 U. S., 270: "The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and within the sphere of the agency a perfect representative, but outside of that it is a lawless usurpation. The constitution of the State is the limit of the authority of its government, and both government and State are sub-
104 ject to the supremacy of the Constitution of the United States and the laws made in pursuance thereof."

Hence, when defendants say the State was *in pari delicto* we must answer that it was only State officers acting outside of their power to represent the State that were *in pari delicto* and not the State, nor was there any executed contract or transaction which the State now seeks to set aside. The contract and transactions were void and nothing was executed by them. There were no payments in contemplation of law and no acceptance of payments by the State. The only executed matter which is sought to be set aside is the application of the payments made by the railroad companies since the

war, which were applied to payment of the amount the roads claimed had been before validly paid in treasury warrants, and the effort to set aside this executed matter is by the defendants, who seek to apply those payments differently.

The only legislation of 1870 which, according to my construction of the acts, sought to ratify the payments made in treasury warrants was the special act for the relief of the H. & T. C. R'y Co. of August 15, 1870, which the journals of both houses show was passed over the veto of Governor Davis, and for the reason just given it cannot be given such effect. The acts extending the time of payment of the indebtedness to the railroads passed in 1870 provided for payments of interest and sinking fund "on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870." I do not think this language imports a recognition of any particular status of accounts in 1870. Some time had to be stated up to which interest should be computed and become a part of the principal upon which interest and sinking fund would thereafter be paid, and the first day of May was adopted as the time to which interest should be computed. But if a contrary construction of this legislation is to be adopted, it must be assumed that the accounts were restated and the railroads recharged with the payments made
105 in treasury warrants on May 1, 1870, as that is the date of the entries on the books, and as there is no other evidence of the date of restating these accounts. Hence the acts mentioned may have referred to the condition of the accounts after they were restated.

Finally, if it was sought by the acts to give effect to the payments made in treasury notes, they cannot be given that effect for constitutional reasons, which I have already stated.

But it would not follow that the consolidation acts of 1870 were void for all purposes if they attempted to ratify the void payments in question. They consisted mainly of grants of privileges to the railroads, which it may fairly be assumed they would have accepted without such supposed ratification of payments claimed by them to have been made. It is true the acts also involve the assumption by the consolidated company of the indebtedness to the school fund owed by railroads entering into the consolidation. But as the security of the State, we must presume, was ample at that time without new property being brought under its lien, and as the consolidated corporation acquired thereby property of greater value than the indebtedness assumed, it is not to be presumed that they would have refused to accept the extension of time for payment of the debts and the privilege of consolidation because the attempted ratification of void payments could not be carried out.

But if the whole of the consolidating acts were held void, the State's right of recovery would not be effected if limited to be satisfied from a sale to be made of those parts of the road on which the State's lien originally existed. It is admitted by defendants that they have those roads in possession and that those roads have in fact been transferred to them by the former owners, and of course

under the law under which the loans were made they took the part of the road on which the loans were made subject to the liens.

106 Another serious question arises, which has not been argued on the trial, as to the right of defendants to maintain their defense, calling for setting aside the application of payments made by them under protest to cover the payments before made in treasury warrants and the making of another application thereof. There is no proof that the governor was threatening to sell out defendants' roads instead of bringing suit, as was ultimately done, to enforce payments claimed by the State to be owing it. The protests filed with the comptroller, asserting threats of immediate seizure and sale by the governor, are not evidence of the facts which they recite, but are only evidence that the defendants allege those statements to be facts and made the alleged facts reasons for payments under protest. The mere payment under protest does not entitle one to recover money unnecessarily paid, nor will the desire to avoid a suit at the time of the payment to test his rights in court be sufficient reason to authorize a recovery of money thus paid under protest. I apprehend the same rule applies to an effort to set aside an application of payments made on one part of a debt under protest, for it is a general rule that when an application of a payment is once made, even if on an illegal claim, the application is conclusive unless fraud, mutual mistake, or duress can be shown. American & English Ency. Law, p. 243, 244, note 1.

Furthermore, it is probable that the governor in the capacity of a trustee, if not in the exercise of his constitutional executive functions, was subject to be prevented by injunction from selling the railroad, if the payments in treasury notes were valid, and, if so, there was ample time and opportunity during the advertisement of the sale to seek this remedy before paying under protest. Where a party has time and opportunity to maintain his rights by taking the offensive or by making a defense in court he cannot pay money in dispute under protest and seek a readjustment afterwards. This is only justified when immediate injury is threatened against which no relief can be had in court until too late.

107 A suit for an injunction to prevent a State officer from doing an injury which he is not authorized by the State to do is not a suit against a State and may be granted when the same officer could not be compelled by mandamus to perform an official duty. Kaufman Co. *v.* McGaughey, ct. civ. app.; Osburne *v.* Bank of U. S., 9 Wheat., 738; Poindexter *v.* Greenhow, 114 U. S., 270.

But as these questions, though arising in the case, were not suggested or argued by counsel, and as I have not thought it necessary to examine into them carefully, owing to the disposition of the case which I had decided to make on the other questions in the case, I will not rest the decision in whole or in part on the last questions mentioned.

Taking the amounts due when the respective railroads defaulted in payments of installments provided for under the act of August 13, 1870, and considering the defaults in payments as abrogating the

installment plan of payment therein provided for and as causing the total amount then owing, principal and interest, to become due, and calculating interest thereon at the rate of 6 per cent. per annum from that date, I find that the Galveston, Harrisburg & San Antonio Railway Company owes the State $447,567.58, and that the Houston & Texas Central Railroad Company owes the State $203,502.71 on account of loans made by the State to the Washington County Railroad Company and $469,606.85 on account of loans made by the State to the Houston & Texas Central Railway Company, making the aggregate amount owing by the Houston & Texas Central Railroad Company $673,109.56.

Judgment will be rendered in the respective cases accordingly for the State and for foreclosure of liens, as prayed for, for the benefit of the permanent school fund, of which the debts owing by the railroad companies became a part under the constitution of 1869 and has continued to be a part thereof by constitutional provisions ever since.

F. G. MORRIS,
District Judge, Presiding.

108 (Endorsed:) 11914. The State of Texas *vs.* G., H. & S. A. R'y Co. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Findings of fact and conclusions of law. Filed February 29, 1896. Jas. P. Hart, clerk.

Substituted Findings of Fact and Conclusions of Law.

Filed March 23rd, 1896.

In District Court of Travis Co., 53rd Judicial Dist.

THE STATE OF TEXAS
vs.
THE H. & T. C. R. R. Co. } No. 11915.

The following conclusions of law and fact by the court will be filed in lieu of the lengthy opinion filed in the case, not with the purpose of changing the conclusions therein expressed, but to condense the same, so as to render the sending up of the opinion in the record unnecessary.

Conclusions of Fact.

1. I conclude that all the allegations of fact contained in plaintiff's original petition are true as therein stated.

2. I conclude that the defendant and the corporation whose rights passed to defendant paid in money the payments which defendant pleads were paid in money on the indebtedness sued on, and that the payments in treasury warrants pleaded by defendant were made in State treasury warrants on the dates set out in defendant's answer, and were accepted by the State officers to whom the payments were made as valid payments.

3. I find that it has not been proved whether the warrants actually used in making the payments were warrants issued for indebtedness incurred prior to the civil war or warrants issued
109 for State indebtedness incurred after the war began, or if of the latter class whether they were warrants issued for military purposes or for civil indebtedness, but from the circumstantial evidence I conclude that neither the railroad company nor the State discriminated as to the class of warrants the railroads received for carrying services or paid on their indebtedness, and that some of all kinds were used in making the payments.

4. I find that said payments in treasury warrants were charged off the account, and the account of the State with the defendant railroad company was restated May 1, 1870, so as to ignore said payments in treasury warrants.

5. It is not proved that the governor was threatening to sell the railroad owned by defendant to force the repayment of the payments made in treasury warrants or whether he would have resorted to a suit to enforce such payments.

In reaching the foregoing conclusions of fact I have excluded from my consideration the statements made in official reports and governors' messages to the legislature, having concluded that defendant's objections that the statements contained in these papers were not admissible as evidence proving or tending to prove the facts therein stated. I have also eliminated from consideration certain other evidence, as shown by explanations attached to defendant's bills of exception.

Conclusions of Law.

1. I conclude that the special school fund loaned to the railroad companies was not controlled by the constitutional provisions in relation to the perpetual school fund contained in the constitution in force when the acts were passed authorizing the payment in State treasury warrants of the indebtedness of the railroad companies to the school fund.

2. I conclude that the acts of the legislature during the civil war authorizing the payment of the indebtedness of the rail-
110 road companies to the school fund in State treasury warrants were passed in aid of the rebellion as well as of the civil State government and were void, and that without these acts there was no authority for the railroad companies making payments of their indebtedness to the school fund in anything other than money nor were the State officers authorized by law to receive payments on said indebtedness in anything but money.

3. I conclude that the acts authorizing the payments in question in treasury warrants were passed in aid of legislation intended to cause State treasury warrants to be issued to circulate as money and with a view to stimulating their circulation as money by adding to the uses which should be made of warrants issued to circulate as money and by bargaining with railroad companies to receive such

warrants at par for freight and passenger services to be rendered to the people and the State.

4. I conclude that the contract made by the railroad companies to receive such warrants at par in order to be able to use them in making payments on their indebtedness to the school fund was a contract made in aid of the rebellion, as it included warrants issued for war purposes as well as for the purpose of civil government, and that such contract was further illegal because made to support the circulation of treasury warrants issued to circulate as money in violation of the State constitution and of the Constitution of the United States, and that therefore the railroad company acquired no right under said contract to use treasury warrants in payment of their indebtedness to the State, nor did the State officers have authority to accept such payments, and they were void.

5. If the legislation referred to was not void because in aid of the unlawful circulation of treasury notes as money and was only void because in aid of the rebellion as to warrants issued in aid of the rebellion, then I hold that the presumption is, and the
111 historical facts show the facts to be, that the officers then exercising the governmental functions respected all acts in aid of the rebellion as legal, as they maintained they were out of the Union, and no presumption can arise that they accepted in such payments only such warrants as were issued in aid of the civil government before or after the war commenced.

6. The burden of proof was upon the defendant to plead and prove the payments relied upon, and when the defendant pleaded a payment in something other than money it devolved on the defendant to plead and describe the very things in which it made payments, so that the court might determine whether the defendant showed *prima facie* a valid payment, and this burden has not been discharged so as to enable the court to decide what was used in making the payments. If this burden had been discharged, the court could have determined from the case made by defendant and the laws of which the court must take judicial notice whether the payments were valid without pleading or proof on the part of the State of additional facts.

7. The issues presented by defendant, arising, as they do, out of an effort to obtain affirmative relief in the nature of a decree setting aside the application of repayments of the amount paid in treasury warrants, imposed the burden of proof on defendant to show that the original payments made in treasury warrants were legal in order to show that the repayments thereof made under protest were unlawfully demanded.

8. I find that it is not the State but State officers acting outside of their authority to represent the State who are *in pari delicto* and who have ratified what has been done if any ratification has taken place.

9. I hold that the payments in question did not constitute an executed matter. Nothing was executed or accomplished by said payments, as they were void and did not amount to payments in

law; neither were they received as payments by the State.
112 They were unlawfully received by State officers, who did not and could not represent or bind the State in this matter.

10. The legislature had no power in 1870 to validate said alleged payments and did not validate them.

11. By the terms of the act of 1870, extending the time for the payment by the railroad companies of their indebtedness to the school fund and providing for the payment of the same by installment, upon default for ten days in making any payment therein provided for, the whole of the principal and interest became due, and I have calculated the interest accordingly and not upon each installment which would have become due if the contract of extension had been complied with by defendant; and, thus calculating the interest, I find the defendant owes the State the amount for which judgment has been rendered.

To which conclusions of law and fact counsel for defendant in open court except.

F. G. MORRIS,
District Judge.

(Endorsed:) No. 11915. The State of Texas *vs.* The H. & T. C. R. R. Co. Substituted findings of fact and conclusions of law. Filed March 23, 1896. Jas. P. Hart, clerk.

Judgment, February 29th, 1896.

FEBRUARY 29TH, 1896.

THE STATE OF TEXAS
vs.
THE H. & T. C. R. R. Co. } 11915.

The above-styled cause coming on to be heard, both par-
113 ties appeared by their attorneys and announced ready for trial, but, no jury being demanded, all questions of fact as well as of law were submitted to the court.

Then came on to be heard the defendant's demurrer to plaintiff's supplemental petition, and, after hearing the same, the court considered that they ought all be overruled, which was accordingly done; to which ruling the defendant then and there excepted.

Then came on to be heard plaintiff's exceptions to the defendant's supplemental answer. The court is of the opinion that the law is against said demurrers, and they are accordingly overruled; to which ruling plaintiff excepted.

The court then, after hearing the evidence and argument of counsel, considered that all of the material allegations in plaintiff's original petition had been fully proved.

It is therefore ordered, adjudged, and decreed by the court that the plaintiff, The State of Texas, do have and recover of and from the Houston & Texas Central Railroad Company the sum of ($673,109.56) six hundred seventy-three thousand one hundred and nine and

$\frac{56}{100}$ dollars (the same being the amount of principal and interest now due), together with all costs of suit.

It being made to appear to the court that the said indebtedness was secured by a lien upon all of defendant's railroad property as described in said plaintiff's original petition—

It is therefore ordered, adjudged, and decreed by the court that the said lien be, and the same is hereby, foreclosed on all of its line of railroad, as described in said petition—that is to say, on its line of railroad beginning at the original terminus of said road on the left bank of Bauffalo bayou, in the city of Houston, in Harris county, Texas, and running thence in a general northwesterly direction through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, and Limestone, to a point about three miles south of
114 Kosse, in Limestone county, including six sections of said road, and also the road formerly known as the Washington County railroad, now known as the Western branch of the Houston & Texas Central Railroad Company, as follows: Beginning at a point of junction of said Western branch with the track of the main line of Houston & Texas Central railroad in the town of Hempstead, in Waller county, thence in a general westerly direction through Waller and Washington counties about twenty-one and ¼ miles to a point in Brenham, in Washington county, and upon all of the charter rights of said defendant company, including the road-bed, right of way, grading, bridges, iron, equipments and masonry, and all stock subscribed for in said company or companies, and upon all depots and depot stations, and all of the property owned by said company or companies as necessary for their business—that is to say, on all of the defendant's railroad property from its terminus at Houston through the various counties of the State to its northern terminus in Denison, Grayson county, Texas, and on its Western branch to its northwestern terminus at Austin, Travis county, Texas, including all of the road-bed, right of way, grade, bridges, iron rails, equipments, and masonry, and all depots and depot stations therein.

And the clerk is hereby commanded to issue an order of sale, directed to the sheriff or any constable of Travis county, Texas, commanding him to sell the above-described property or so much thereof as may be necessary for the satisfaction of the judgment rendered in this case, and to issue an order of sale, directed to the sheriff or any constable of any other county in Texas, upon application of plaintiff's counsel, directing all of the property hereinbefore described to be sold or so much thereof as may be sufficient for the satisfaction of the judgment rendered in this case; and in the event said property does not sell for enough to satisfy same, then that an execu-
115 tion may issue in favor of the plaintiff, The State of Texas, for the balance remaining unpaid.

It is further ordered that execution issue in favor of the officers of the court against the defendant for all costs herein incurred, for which they may have their execution.

To which judgment and to the judge's conclusion of law and

fact the defendant excepts and in open court gives notice of appeal to the court of civil appeals.

Order Allowing Ten Days.

MARCH 7TH, 1896.

STATE OF TEXAS
vs.
H. & T. C. R. R. Co. } 11915.

On this day, on motion, it is ordered by the court that the parties to this cause do have ten (10) days' time from and after the adjournment of the present term of this court in which to prepare and file a statement of facts in this cause.

Order on Original Papers.

MARCH 10TH, 1896.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } 11915.

Upon application of The State of Texas, plaintiff in the above-styled cause—

116 It is hereby ordered by the court that one-half of the original warrants in evidence in this case by the State shall be by the clerk sent up with the transcript to the court of civil appeals and to the Supreme Court and all other tribunals to which it may be carried for the inspection of said courts, said warrants being numbered as follows: 4741, 1811, 1812, 1810, 1821, 1822, 1824, 1823, 1825, 1830, 1829, 1807, 1818, 1816, 1831, 1819, 1806, 1826, 9100, 8917, 2332, 130, 3864, 3863, 3865, 11554, 11552, 11257, 3846, 8955, 3840, 2430, 3971, 3726, 14087, 14085, 14089, 13726, 13725, 15724, 13956, 13955, 13954, 13953, 10591, 13501, 3686, 37100, 115741, 15841, 50310, 1832, 1834, 1833, 9875, 3539, 2318, 8168, 352, 8167, 14678, 15370, 13626, 2470, 3529, 7882, 7869, 7894, 12269, 12268, 925, 5172, 6102, 14254, 5825, 5830, 16889, 7303, 11265, 2050, 7536, 16888, 2859, 4327, 4328, 4318, 4326, 4355, 4353, 910, 16887, 10247, 524, 24439, 84651, 104846, 84645, 55519, 14154, 14174, 42511, 16897, 14155, 18651, 20562, 22972, 69167, and several warrants whose numbers have been so defaced that they cannot be ascertained.

The other and remaining warrants — were offered in evidence and not included herein will be sent up with the case of The State of Texas *vs.* The Galveston, Harrisburg & San Antonio R'y Co., tried in this court, in which case they were likewise offered in evidence.

Def't's Bill of Exceptions No. 2.

Filed March 12th, 1896.

The Fifty-third Judicial District Court in and for Travis County, Texas.

117 THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions number two.

Be it remembered that on the trial of the above numbered and entitled cause defendant, on cross-examination of the witness R. S. Lovett, who was introduced by the plaintiff, and after said witness had testified, as shown in the statement of facts, offered to prove by said witness that he was of counsel in this case and had been specially charged by his associates with the preparation of the case for trial; that he had made inquiries of the auditor and the secretary of the defendant company as to whether the books or records of defendant showed or there was any data within their knowledge showing and whether there was any one then connected with defendant or known to them who knew the date, denomination, or character of the State treasury warrants used in making the payments made in treasury warrants on the loan now in question, and that he was unable to get any such information or learn the name of any person or persons who had such information, and was informed by defendant's auditor and secretary that there were no books, records, or data of any kind in their possession or within their knowledge giving such information; to which evidence counsel for plaintiff objected upon the ground that it was hearsay; which objection was sustained and such evidence excluded; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the officers of whom witness made inquiry were themselves subsequently sworn and testified to an absence of data
118 in the books on the subjects inquired about, and for all purposes of this decision I held that the defendant was unable to prove the class of warrants used in payments.

F. G. MORRIS,
Judge Fifty-third Judicial District of Texas, Presiding.

(Endorsed:) 11915. State of Texas *vs.* H. & T. C. R. R. Co. 53rd jud. dist. court, Travis Co. Defendant's bill of exceptions # 2. Filed Mar. 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 3.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
v.
HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions number three.

Be it remembered that on the trial of the above styled and numbered cause plaintiff's witness, F. R. Lubbock, after testifying, among other things, that he was governor of Texas from November, 1861, to November, 1863, testified, in answer to questions propounded by plaintiff's counsel, substantially and in effect that the market price of the treasury warrants of the State of Texas issued during the war varied at different times; that they commenced depreciating, and in 1863 and 1864 there was little value attached to them; that while governor
119 he was accustomed to sell warrants issued to him for his salary from time to time, and upon his retirement from the office of governor in November, 1863, he sold the warrants issued to him for his salary to Mr. De Foe, a druggist in Austin, for ten cents on the dollar. Reference is here made to the testimony of Governor Lubbock as set forth in the statement of facts for further explanation and as a part of this bill of exceptions; to which questions, answers, and evidence relating to the market value of such warrants and the price for which witness sold warrants counsel for defendant then and there duly objected upon the ground (1) that the same was irrelevant, (2) that the same was immaterial to any issue in this case, and (3) that the State could not legally complain in this case of the depreciating value of her warrants; which objections were by the court overruled and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that I gave this testimony no effect in reaching a conclusion, because it did not appear when defendant obtained the warrants used in payments or whether they were purchased at the market price or received at par in payment of carrying charges.

F. G. MORRIS,
Judge 53rd Judicial District of Texas, Presiding.

(Endorsed:) 11915. State of Texas *vs.* H. & T. C. R. R. Co. 53rd jud. dist. court, Travis Co. Defendant's bill of exceptions # 3. Filed Mar. 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 4.

Filed March 12th, 1896.

120 In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
v.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions number four.

Be it remembered that on the trial of the above styled and numbered cause counsel for the plaintiff introduced a duly authenticated copy of the message of Governor E. J. Davis to the twelfth legislature of Texas, dated August 6, 1870, vetoing the act entitled "An act for the relief of the Houston & Texas Central Railway Company," which message is set forth in the statement of facts, and to which, as therein contained, reference is here made as a part of this bill of exceptions; to the introduction of which document counsel for defendant then and there duly objected upon the ground (1) that the same was irrelevant and not material to any issue in this case, and (2) that the conclusions, opinions, and arguments therein contained were not admissible as evidence of any fact material in this case; which objections were by the court overruled and said document was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the objectionable evidence was not considered as evidence in deciding the case.

F. G. MORRIS,
Judge Fifty-third Judicial District of Texas, Presiding.

121 (Endorsed:) 11915. State of Texas *vs.* H. & T. C. R. R. Co. 53rd judicial district court, Travis Co. Defendant's bill of exceptions No. 4. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 5.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
v.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions number five.

Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence that part of the message of Governor Lubbock, dated November 15, 1861, to the regular session of the ninth legislature, which is set forth in the statement of facts, and to which, as there contained, reference is here made as a part of this bill of exceptions. Counsel for defendant then and there objected to the introduction of the same upon the ground (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the plaintiff could not in such manner show the purpose or intent of the legislature in enacting laws or the meaning of laws passed by the legislature, (3) that the same was inadmissible as evidence of the intent or meaning of acts passed by the legislature or for any other purpose, (4) that said message was not admissible as evidence of the facts as therein stated, and (5) that it does not appear that the said message refers to the kind or character of warrants used in making the pay-
122 ments in question and has not been connected by evidence with such warrants; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the objectionable evidence was not considered in deciding the case.

F. G. MORRIS,
Judge Fifty-third Judicial District of Texas, Presiding.

(Endorsed:) 11915. State of Texas *vs.* H. & T. C. R. R. Co 53rd judicial district court, Travis Co. Defendant's bill of exceptions No. 5. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 6.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
v.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions number six.

Be it remembered that upon the trial of the above styled and numbered cause counsel for plaintiff offered in evidence that part of the message of Governor Lubbock, dated February 5, 1863,
123 to the extra session of the ninth legislature, which is set forth in the statement of facts, and to which, as there contained, reference is here made as a part of this bill of exceptions. Counsel for defendant then and there objected to the introduction of the same upon the ground (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the plaintiff could not in such manner show the purpose or intent of the legislature in enacting laws or the meaning of laws passed by the legislature, (3) that the same was inadmissible as evidence of the intent or meaning of acts passed by the legislature or for any other purpose, (4) that said message was not admissible in evidence of the facts as therein stated, and (5) that it does not appear that the said message refers to the kind or character of warrants used in making the payments in question and has not been connected by evidence with such warrants; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and on this 8 day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the objectionable evidence was not considered in deciding the case.

F. G. MORRIS,
Judge Fifty-third Judicial District of Texas, Presid ng.

(Endorsed:) 11915. State of Texas *vs.* H. & T. C. R. R. Co. 53rd judicial district court, Travis Co. Defendant's bill of exceptions No. 6. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 7.

Filed March 12th, 1896.

124 In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
v.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions number seven.

Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence message of Governor Lubbock, dated November 5, 1863, to the regular session of the tenth legislature, which is set forth in the statement of facts, and to which, as therein contained, reference is here made as a part of this bill of exceptions. Counsel for defendant then and there objected to the introduction of the same upon the ground (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the plaintiff could not in such manner show the purpose or intent of the legislature in enacting laws or the meaning of laws passed by the legislature, (3) that the same was inadmissible as evidence of the intent or meaning of acts passed by the legislature or for any other purpose, (4) that said message was not admissible as evidence of the facts as therein stated, and (5) that it does not appear that the said message refers to the kind or character of warrants used in making the payments in question and has not been connected by evidence with such warrants; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered,
125 with the explanation that the objectionable testimony was not considered in deciding the case.

F. G. MORRIS,
Judge of the Fifty-third Judicial District of Texas, Presiding.

(Endorsed:) 11915. State of Texas *vs.* H. & T. C. R. R. Co. 53rd judicial district court, Travis Co. Defendant's bill of exceptions No. 7. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 9.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
v.
HOUSTON & TEXAS CENTRAL RAILROAD Co. } No. 11915.

Bill of exceptions number nine.

Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence that part of the message of Governor P. Murrah, dated May 11, 1864, to the first extra session of the 10th legislature, which is set forth in the statement of facts, and to which, as there contained, reference is here made as a part of this bill of exceptions. Counsel for defendant then and there objected to the introduction of the same upon the ground (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the plaintiff could not in such manner
126 show the purpose or intent of the legislature in enacting laws or the meaning of laws passed by the legislature, (3) that the same was inadmissible as evidence of the intent or meaning of acts passed by the legislature or for any other purpose, (4) that said message was not admissible as evidence of the facts as therein stated, and (5) that it does not appear that the said message refers to the kind or character of warrants used in making the payments in question and has not been connected by evidence with such warrants; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the objectionable testimony was not considered in deciding the case.

F. G. MORRIS,
Judge of the Fifty-third Judicial District of Texas, Presiding.

(Endorsed:) 11915. State of Texas *vs.* H. & T. C. R. R. Co. 53rd judicial district court, Travis Co. Defendant's bill of exceptions No. 9. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 10.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
v.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

127 Bill of exceptions number ten.

Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence the message of Governor P. Murrah, dated October 20, 1864, to the second extra session of the tenth legislature, which is set forth in the statement of facts, and to which, as therein contained, reference is here made as a part of this bill of exceptions. Counsel for defendant then and there objected to the introduction of the same upon the ground (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the plaintiff could not in such manner show the purpose or intent of the legislature in enacting laws or the meaning of laws passed by the legislature, (3) that the same was inadmissible as evidence of the intent or meaning of acts passed by the legislature or for any other purpose, (4) that said message was not admissible as evidence of the fact as therein stated, and (5) that it does not appear that the said message refers to the kind or character of warrants used in making the payments in question and has not been connected by evidence with such warrants; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the objectionable testimony was not considered in deciding the case.

F. G. MORRIS,
Judge of the Fifty-third Judicial District of Texas, Presiding.

(Endorsed:) 11915. State of Texas *vs.* H. & T. C. R. R. Co. 53rd judicial district court, Travis Co. Defendant's bill of exceptions No. 10. Filed March 12, 1896. Jas. P. Hart, clerk.

128 *Def't's Bill of Exceptions No.* 11.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 11.

Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence a certificate of R. W. Finley, comptroller of public accounts of the State of Texas, dated the 27th day of January, 1896, under his seal of office, setting forth copies of certain entries therein specified as contained in the books of his department showing the charging of certain eight per cent. State bonds to the military board during the years 1862, 1863, and 1865, and other entries in reference to such bonds during said years. Reference is here made to the said certificate as set forth in the statement of facts as a part of and in further explanation of this bill of exceptions. Counsel for defendant then and there objected to the introduction of said certificate or statement upon the grounds (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the same was not competent evidence in behalf of the State of the contents of the books or of any entries in the books of the comptroller of public accounts of the State of Texas, (3) that the entries in the books of the comptroller set forth in said certificate or state-
129 ment were not competent evidence in behalf of the State for the use, application, and disposition of said bonds or of any other purported fact, and (4) that the warrants used in making the payments in question or the railway companies making such payments or defendants were not connected by the evidence in any way with the facts or transactions set forth or stated in said certificate or statement, or with the transactions of said military board; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the objectionable evidence was not considered as evidence in deciding the case, the case having been decided upon the unconstitutionality of the statutes involved and the lack of proof by defendant, each as separate, conclusive, and independent grounds for the decision.

F. G. MORRIS,
Judge of the Fifty-third Judicial District of Texas, Presiding.

(Endorsed:) No. 11915. State of Texas *vs.* H. & T. C. R. R. Co. Bill of exceptions No. 11. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 12.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

130 THE STATE OF TEXAS *vs.* HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 12.

Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence a statement or account headed "The State of Texas school fund in account with C. H. Randolph, treasurer, for the two months ending on the 31st December, 1864," certified to by R. W. Finley, comptroller of public accounts, under his seal of office, on the 18th day of January, 1896, as a true and correct copy of the instrument then on file in his department, and also certified to by W. B. Wortham, treasurer, under his seal of office, on the 7th day of February, 1896, as a true and correct statement as shown by the books of his office. Reference is here made to the said certified statement as set forth in the statement of facts as a part of and in further explanation of this bill of exceptions. Counsel for defendant then and there objected to the introduction of said statement upon the ground (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the same was not competent evidence in behalf of the State of the contents of the books or of any entries of the books of the comptroller of public accounts or of the treasurer of the State of Texas, (3) that the same purported to be merely a copy of a statement prepared on December 31st, 1864, by C. H. Randolph, the then treasurer of the State, and was not competent evidence in behalf of the State of the facts it purported to show, (4) that the same did not show the character of the treasury warrants therein mentioned, or that they were otherwise than legal and valid, and (5) that the statement or account contained in the books of the comptroller
131 or treasurer or on file in their departments was not competent evidence in behalf of the State of the facts purported to be thus shown or recorded; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that no finding of fact has been made in favor of the State upon the issue upon which this was introduced.

F. G. MORRIS,
Judge of the Fifty-third Judicial District of Texas, Presiding.

(Endorsed :) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Bill of exceptions No. 12. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 13.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 13.

132 Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence *or* account headed "The State of Texas school fund in account with C. H. Randolph, treasurer, for two months ending the 28th day of February, 1865," certified to by R. W. Finley, comptroller of public accounts, under his seal of office, on the 18th day of January, 1896, as a true and correct copy of the instrument then on file in his department, and also certified to by W. B. Wortham, treasurer, under his seal of office, on the 7th day of February, 1896, as a true and correct statement, as shown by the books of his office. Reference is here made to the said certified statement as set forth in the statement of facts as a part of and in further explanation of this bill of exceptions. Counsel for defendant then and there objected to the introduction of said statement upon the grounds (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the same was not competent evidence in behalf of the State of the contents of the books or of any entries of the books of the comptroller of public accounts or of the treasurer of the State of Texas, (3) that the same purported to be merely a copy of a statement prepared on February 28th, 1865, by C. H. Randolph, the then treasurer of the State, and was not competent evidence in behalf of the State of the facts it purported to show, (4) that the same did not show the character of the treasury warrants therein mentioned, or that they were otherwise than legal and valid, and (5) that the statement or account contained in the books of the comptroller or treasurer and on file in their departments was not competent evidence in behalf of the State of the facts purported to be thus shown or recorded; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered,
133 with the same explanation as that given to bill of exceptions No. 12.

F. G. MORRIS,
Judge Fifty-third Judicial District of Texas, Presiding.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Bill of exceptions No. 13. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 14.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 14.

Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence a statement or account headed "The State of Texas school fund in account with C. H. Randolph, treasurer, for the quarter ending on the 31st day of May, 1865," certified to by R. W. Finley, comptroller of public accounts, under his seal of office, on the 18th day of January, 1896, as a true and correct copy of the instrument then on file in his department, and also certified to by W. B. Wortham, treasurer, under his seal of office, on the 7th day of February, 1896, as a true
134 and correct statement as shown by the books of his office. Reference is here made to the said certified statement as set forth in the statement of facts as a part of and in further explanation of this bill of exceptions. Counsel for defendant then and there objected to the introduction of said statement upon the grounds (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the same was not competent evidence in behalf of the State of the contents of the books or of any of the entries of the books of the comptroller of public accounts or of the treasurer of the State of Texas, (3) that the same purported to be merely a copy of a statement made by C. H. Randolph, the then treasurer of the State, on the 31st day of May, 1865, and was not competent evidence in behalf of the State of the facts it purported to show, (4) that the same did not show the character of the treasury warrants therein mentioned, or that they were otherwise than legal and valid, and (5) that the statement or account contained in the books of the comptroller or treasurer and on file in their departments was not competent evidence in behalf of the State of the facts purported to be thus shown or recorded; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation appended to bill of exceptions No. 12.

F. G. MORRIS,
Judge of the Fifty-third Judicial District of Texas, Presiding.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Bill of exceptions No. 14. Filed March 12th, 1896. Jas. P. Hart, clerk.

135 *Def't's Bill of Exceptions No.* 15.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 15.

Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence a statement headed "Statement of treasurer's receipts from revenue and other sources during the months of January and February, 1865," certified to by R. W. Finley, comptroller of public accounts, under his official seal, on the 18th day of January, 1896, as a true and correct copy of the original of said instrument then on file in his department; also certified to by W. B. Wortham, treasurer, under his official seal, on the 7th day of February, 1896, as a true and correct statement as shown by the books of his office; which statement showed the treasurer's receipts from revenue and other sources during the two months stated to be as follows: In new issue Confederate notes, $10,292.08; in specie, $8,794.50; in treasury warrants fundable in 8 per cent. bonds, $9,820.91; in treasury warrants fundable in 6 per cent. bonds, $14,982.34; total, $43,889.83. Counsel for defendant then and there objected to the introduction of said certified statement upon the grounds (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the
136 same was not competent evidence in behalf of the State of the contents of the books or of any entries in the books or records of the comptroller of public accounts of the State of Texas; which objections were overruled and said evidence admitted; to which ruling of the court counsel for defendant then and there duly excepted, and now tender this their bill of exceptions, and on this 7th day of March, 1896, pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation appended to bill No. 12.

F. G. MORRIS,
District Judge.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Bill of exceptions No. 15. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 16.

Filed March 12th, 1896.

n the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 16.

Be it remembered that on the trial of the above styled and numbered cause counsel for plaintiff offered in evidence a statement headed "Statement of treasurer's receipts from revenue and from other
37 sources during the month of April, 1865," certified to by R. W. Finley, comptroller of public accounts, under his official seal, on the 18th day of January, 1896, as a true and correct copy of the original of said instrument then on file in his department, and also certified to by W. B. Wortham, treasurer, under his official seal, on the 7th day of February, 1896, as a true and correct statement, as shown by the books of his office; which statement showed the treasurer's receipts from revenue and other sources during the month of April, 1865, to be as follows: In specie, $43.00; in Confederate notes, $172,231.22; in treasury warrants fundable in 8 per cent. bonds, $6,607.34; in treasury warrants fundable in 6 per cent. bonds, $5,074.00; total, $182,955.56; from special loan taxes, $1,000 in Confederate notes, and from cotton sales, $1,500 in specie. Counsel for defendant then and there objected to the introduction of said certified statement upon the grounds (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the same was not competent evidence in behalf of the State of the contents of the books or of any entries in the books or records of the comptroller of public accounts or of the treasurer of the State of Texas; which objections were by the court overruled and said evidence admitted; to which ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation appended to bill No. 12.

F. G. MORRIS,
District Judge.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Bill of exceptions No. 16. Filed March 12, 1896. Jas. P. Hart, clerk.

138 *Def't's Bill of Exceptions No.* 17.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No 17.

Be it remembered that upon the trial of the above styled and numbered cause counsel for the plaintiff offered in evidence that part of the recommendations of C. R. Johns, former comptroller of the State of Texas, made in his annual report as comptroller of public accounts, dated the — day of November, 1861, which part of said report so offered in evidence is set forth in the statement of facts, and to which reference is here made as a part and in further explanation hereof. Counsel for the defendant then and there objected to the introduction of the same upon the grounds (1) that the same was irrelevant and immaterial to any issue in this case, (2) that the plaintiff could not in such manner show the purpose or intent of the legislature in enacting laws or the meaning of laws passed by the legislature, which was the purpose for which it was introduced, (3) that the same was inadmissible as evidence of the intent and meaning of the acts passed by the legislature or for any other purpose, (4) that the same was not admissible as evidence of any of the facts as therein stated, and (5) it is not shown that the same refers to the kind or character of
139 warrants used in making the payments in question and has not been connected by evidence with such warrants; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for the defendant then and there duly excepted, and on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the objectionable evidence was not considered as evidence in deciding the case.

F. G. MORRIS,
District Judge.

(Endorsed:) No. 11915. The State of Texas *vs.* The H. & T. C. R. R. Co. Bill of exceptions No. 17. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 18.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 18.

Be it remembered that on the trial of the above numbered and styled cause counsel for the plaintiff offered in evidence direct interrogatories Nos. 10 and 11 propounded to and the answers thereto by E. W. Cave, whose depositions were taken in behalf of the
140 plaintiff, and also offered the treasury warrant attached as an exhibit to said depositions and as a part of said answers; which interrogatories and answers and exhibit are contained in the statement of facts, to which reference is here made as a part and in explanation hereof. Counsel for the defendant objected to said questions, answers, and exhibit, in so far as the same was offered as evidence to show the kind and character of warrants used in making the payments in question, upon the ground (1) that the same was irrelevant, and (2) that it was not shown that the warrant which is offered was the kind and character used in making the payments in question; which objections were by the court overruled, and said evidence was admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the objectionable evidence was not considered in deciding the case.

F. G. MORRIS,
District Judge.

(Endorsed:) 11915. The State of Texas *vs.* The H. & T. C. R. R. Co. Bill of exceptions No. 18. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 19.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

141 THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 19.

Be it remembered that upon the trial of the above numbered and styled cause the plaintiff introduced W. C. McCall, who, after testifying in effect that he was an employé in the comptroller's department of the State of Texas and had been, at the instance of the attorney general, assigned by the comptroller, together with G. A. Proctor, to the duty of searching for evidence of the character of the warrants in which the payments in question were made, — that he had been unable to find any data or memoranda of any kind showing the kind or character of warrants used in making such payments; that there were a large number of old warrants, purporting to have been issued during the war, in the basement of the comptroller's office without any indorsement or writing on them to indicate and he was unable to find any data or memoranda to indicate by whom or for what purpose or on what account such warrants were received or from whom they were received; that he had not examined all the warrants in the basement, but at the request of the attorney general, representing the plaintiff in this case, had taken from the lot a number, which he then produced and identified as those so taken by him from the basement of the comptroller's office shortly before the trial. Thereupon, in connection with said witness' testimony, counsel for the plaintiff offered in evidence the treasury warrants so produced by the witness, and which are set forth and described in the statement of facts in connection with the testimony of said witness, to which reference is here made as a part and in explanation hereof and for further description of said warrants;

142 and in so offering them, counsel for the plaintiff stated that they were offered for the purpose of showing the character of the warrant- issued during the war, for the purpose of showing that in form, shape, denomination, and size they were suitable for use as money, and as a circumstance tending to show that they were issued to be circulated, and to show that many of them were issued for military services and in aid of the rebellion. To the introduction of each and all of said warrants for all or either of such purposes, or for any purpose, counsel for defendant then and there objected on the ground (1) that the same were irrelevant and immaterial to any issue in this case, (2) that it is not shown that they were the warrants or the same or similar kind and character of warrants used by the railroad companies under whom the defend-

ant claims in making any of the payments that were made in such treasury warrants for the loan described in the plaintiff's petition, (3) that it appeared that the warrants so offered were selected by the plaintiff's witness from a mass of other warrants the character of which was not shown, and (4) that said warrants were not competent evidence to show all the kind and character of warrants issued at different times and for different purposes and for different amounts during the war; which objections were by the court overruled and said evidence admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and prays that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the objectionable evidence was not considered in deciding the case.

F. G. MORRIS,
District Judge.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Bill of exceptions No. 19. Filed March 12, 1896. Jas. P. Hart, clerk.

143 *Def't's Bill of Exceptions No.* 20.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 20.

Be it remembered that upon the trial of the above numbered and styled cause the plaintiff introduced G. A. Proctor, who, after testifying in effect that he was an employé of the comptroller's department of the State of Texas, and had been, at the instance of the attorney general, assigned by the comptroller, together with W. C. McCall, to the duty of searching for evidence of the character of the warrants in which the payments in question were made, — that he had been unable to find any data or memoranda of any kind showing the kind or character of warrants used in making such payments; that there were a large number of old warrants, purporting to have been issued during the war, in the basement of the comptroller's office without any indorsement or writing on them to indicate and he was unable to find any data or memoranda to indicate by whom or for what purpose or on what account such warrants were received or from whom they were received; that he had not examined all the warrants in the basement, but at the request of the attorney general, representing the plaintiff in this case, had taken from the lot a number which he then produced and

identified as those taken by him from the basement of the
144 comptroller's office shortly before the trial. Thereupon, in connection with the said witness' testimony, counsel for the plaintiff offered in evidence the treasury warrants so produced by the witness and which are set forth and described in the statement of facts in connection with the testimony of said witness, to which reference is here made as a part and in explanation hereof and for further description of said warrants; and in so offering them counsel for the plaintiff stated that they were offered for the purpose of showing the character of the warrants issued during the war, for the purpose of showing that in form, shape, denomination, and size they were suitable for use as money, and as a circumstance tending to show that they were issued to be circulated and to show that many of them were issued for military services and in aid of the rebellion; to the introduction of each and all of said warrants for all or either of such purposes or for any purpose counsel for defendant then and there objected on the ground (1) that the same were irrelevant and immaterial to any issue in this case; (2) that it is not shown that they were the warrants or the same or similar kind and character of warrants used by the railroad companies under whom the defendant claims in making any of the payments that were made in such treasury warrants for the loan described in the plaintiff's petition; (3) that it appeared that the warrants so offered were selected by the plaintiff's witness from a mass of other warrants, the character of which was not shown, and (4) that said warrants were not competent evidence to show all the kind and character of warrants issued at different times and for different purposes and for different amounts during the war; which objections were by the court overruled and said evidence admitted; to which action and ruling of the court counsel for defendant then and there duly excepted, and now, on this 7th day of March, 1896, tender this their bill of exceptions and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered,
with the explanation that the objectionable evidence was not
145 considered in deciding the case.

F. G. MORRIS,
District Judge.

(Endorsed:) No. 11915. The State of Texas *vs.* The H. & T. C. R. R. Co. Bill of exceptions No. 20. Filed March 12, 1896. Jas. P. Hart, clerk.

Def't's Bill of Exceptions No. 21.

Filed March 12th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Bill of exceptions No. 21.

Be it remembered that upon the trial of the above numbered and styled cause, counsel for defendant offered in evidence cross-interrogatory No. 2, propounded to and the answer thereto by E. W. Cave, whose depositions were taken by the plaintiff, which question and answer were as follows:

"Cross-int'y 2nd. Please state, if you know, whether there was on the 18th day of January, 1861, outstanding and then unpaid bonds and treasury warrants of the State of Texas theretofore executed, issued, and delivered by said State, and whether there was any such bonds and warrants issued prior to the 18th day of January, 1861, and outstanding and unpaid on the 18th day of
146 March, 1861, the 1st day of February, 1861, and during the years 1863, 1864, & 1865.

"Answer to cross-int'y No. 2. My recollection is that in January, 1861, and February and March, 1861, there was outstanding and unpaid a large amount of the State treasury warrants of the State of Texas previously issued, and that a large indebtedness existed at those times for which State treasury warrants had not then been issued. The heavy drain upon the revenues of Texas for the defense of the frontier against Indians, and from incursions from Mexico depleted the treasury, and State treasury warrants were issued and outstanding and unpaid, as stated, in March, 1861, and State treasury warrants were afterwards, during the war, issued to cover indebtedness and appropriations existing prior to March, 1861. I cannot speak as to the bonded indebtedness existing. I do not know what payment was made of such treasury warrants by the State of Texas. My recollection is that they were also made receivable for State taxes and State dues and for sale of the public lands."

To which question and answer and evidence counsel for the plaintiff then and there objected, upon the ground that the books and records of the comptroller's office were the best evidence of the amount of such warrants outstanding and unpaid at the times enquired about, and that said question and answer were not competen evidence of such facts; which objections were by the court sustained and such evidence was excluded; to which action and ruling of the court counsel for defendant then and there duly excepted, and on

this 7th day of March, 1896, tender this their bill of exceptions, and pray that the same be allowed and filed as a part of the record in this cause, and it is so ordered, with the explanation that the court took judicial notice of the fact that large appropriations were made for debts incurred prior to the war against which warrants were issued, and that all of these had not been paid when defendant acquired warrants to make the payments in question.

F. G. MORRIS,
District Judge.

147 (Endorsed:) No. 11915. The State of Texas *vs.* The H. & T. C. R. R. Co. Bill of exceptions No. 21. Filed March 12, 1896. Jas. P. Hart, clerk.

Statement of Facts.

Filed March 31st, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Be it remembered that on the trial of the above styled and numbered cause the following evidence was introduced:

Plaintiff's Evidence.

Plaintiff first introduced in evidence a stipulation in writing signed by defendant's counsel and filed as follows:

In District Court, Travis County, Texas, Fifty-third Judicial District.

THE STATE OF TEXAS
vs.
THE HOUSTON & TEXAS CENTRAL RAILROAD CO. } No. 11915.

It is admitted by the defendant that the State of Texas made to the Houston & Texas Central Railway Company and to the Washington County Railroad Company, under the provisions of
148 an act entitled "An act to provide for the investment of the special school fund in the bonds of railroads incorporated by the State," approved August 13th, 1856, loans in the amounts and at the dates set forth in the plaintiff's original petition, and that said companies executed and delivered to the State of Texas on the dates and in the amounts set forth in said petition the bonds described in the petition, in consideration of said loans.

It is also admitted that on or before the 15th day of August, A. D. 1870, the Washington County railway became consolidated with and merged into the Houston & Texas Central railway, and that

said Houston & Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railroad Company.

This admission is not to be construed as an acknowledgment of waiver of any right of either party not expressly covered by it or as affecting any other question in the case of law or of fact not expressed herein, and it is made without prejudice to the right of either party to introduce any other relevant evidence not inconsistent herewith.

(Signed) J. P. BLAIR,
(Signed) BAKER, BOTTS, BAKER & LOVETT,
Att'ys for H. & T. C. R. R. Co.

2. Plaintiff next introduced a duly authenticated copy of the articles of incorporation of the defendant, The Houston & Texas Central Railroad Company, filed in the office of the secretary of state on the first day of August, 1889, as follows:

Articles of Incorporation of the Houston & Texas Central Railroad Company.

Whereas Frederick P. Olcott is the owner of the railroads
149 formerly owned by the Houston & Texas Central Railway Company, a corporation created by and under the laws of the State of Texas, extending from Houston, Harris county, Texas, to Denison, Grayson county, Texas, and from Hempstead, Waller county, Texas, to Austin, Travis county, Texas, with the road-beds, rights of way, tracks, franchises, and chartered rights relating to said railroads or used in the operation thereof; which said railroads and other property were conveyed to him by Charles Dillingham, as special master commissioner; Nelson S. Easton and Jas. Rintoul, as trustee of the main line first mortgage of the Houston & Texas Central Railway Company, dated July 1st, 1866, and of the Western division first mortgage of said railway company, dated Dec. 21st, 1870; the Farmers' Loan & Trust Company, as trustee of the main line and Western division consolidated mortgage, dated October 1st, 1872, and of the general mortgage of said railway company, dated April 1st, 1881, and of the Waco and Northwestern division consolidated mortgage, dated May 1st, 1875; Benjamin A. Shepard, as sole surviving trustee of the income and indemnity mortgage of said railway company, dated May 7th, 1877, and the Houston & Texas Central Railway Company, by deed dated the eighteenth day of January, A. D. 1889; which said deed has been duly recorded in each of the counties into or through which the said railroads run and are constructed, and which said deed was executed in pursuance of a sale of said property, at which said Olcott became the purchaser, made on the 8th day of September, 1888, by virtue and in accordance with a certain order of sale contained in a decree rendered in the circuit court of the United States for the eastern district of Texas on the 4th day of May, A. D. 1888, in a certain cause then pending in said court under the title of "Nelson S.

Easton and James Rintoul, trustees, and The Farmers' Loan & Trust Co., trustees, *vs.* The Houston & Texas Central Railway Company *et als.*," and bearing the number 198, consolidated cause, on the chancery docket of said court; which said sale and pur-
150 chase was in all things confirmed by the said court by an order of confirmation duly entered in the said cause on the fourth day of December, 1888, and

Whereas the said Frederick P. Olcott, desiring to avail himself of the rights and privileges of the general laws of Texas, and more especially of an act entitled "An act to amend chapter II, title LXXXIV of the Revised Civil Statutes of the State of Texas, so as to add thereto another article to be known as article 4260*a*," approved March 29th, 1889, has associated with himself the other subscribers for the purpose of forming a corporation under the laws of the State of Texas to acquire, own, maintain, and operate the railroads so purchased aforesaid (including the power to construct and extend.) Now to this end the said Olcott and his associates adopt and sign the following articles of incorporation:

Article I.

The name of said corporation shall be the Houston & Texas Central Railroad Company.

Article II.

This corporation is organized for the purpose of acquiring, owning, maintaining, and operating (including the power to construct and extend) the railroads heretofore forming a part of the railroads of the Houston & Texas Central Railway Company, and known as the "main line" and "Western division" of said railway, sold and purchased as herein stated in the preamble, the said "main line" commencing at the city of Houston, in Harris county, and extending to Denison, in Grayson county, in the State of Texas, through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, Limestone, Freestone, Navarro, Ellis, Dallas, Collin, and Grayson, a distance of about three hundred and forty-five (345) miles; and the "Western division," commencing at Hempstead, in Waller county, and extending to the city of Austin, in Travis county, through the counties of Waller, Washington, Lee, Fayette, Bastrop, and
151 Travis, a distance of about one hundred and nineteen (119) miles; the total length of said railroad being four hundred and sixty-four (464) miles.

Article III.

The principal business office of the said corporation shall be established and maintained in the city of Houston, Harris county, Texas.

Article IV.

The time of commencement of the said corporation shall be the date of the filing of these articles of incorporation in the office of the secretary of state of Texas, and the period of the continuation

of the same shall be fifty years with the right of renewal from time to time as prescribed by the laws under which this corporation is formed.

Article V.

The amount of the capital stock of said corporation shall be ten million dollars.

Article VI.

The names and places of residence of the several persons forming the association for incorporation are as follows:

Names.	Residence.
Frederick P. Olcott	New York city.
Benjamin G. Mitchell	New York city.
George S. Ellis	Parkville, Long Island, N. Y.
Henry E. Malin	New York city.
Frank W. Emery	New York city.
Frank L. Grant	Brooklyn, N. Y.
James N. Wallace	Jersey City, N. J.
Milton Ferguson	Brooklyn, N. Y.
John Q. Adams, Jr.	Orange, N. J.
Phillip S. Babcock	Brooklyn, N. Y.
William H. Ludlum	Staten Island, N. Y.

152 Article VII.

The government of the said corporation and the managment of its affairs shall be vested in a board of directors consisting of nine persons. The names of the members of the first board of directors are as follows:

E. Francis Hyde.
Charles H. P. Babcock.
Charles Dillingham.
E. W. Cave.
George A. Quinlan.
J. J. Atkinson.
Charles Fowler.
Daniel Ripley.
J. G. P. Sumner.

Article VIII.

The capital stock of said corporation is divided into one hundred thousand shares of one hundred dollars each.

Witness our hands this the twenty-fourth day of July, A. D. 1889.

(Signed) F. P. OLCOTT.
BENJAMIN G. MITCHELL.
G. S. ELLIS.
H. E. MALIN.
F. W. EMERY.
F. L. GRANT.
J. N. WALLACE.
M. FERGUSON.
JNO. Q. ADAMS, JR.
PHILLIP S. BABCOCK.
WILLIAM H. LUDLUM.

153 STATE OF NEW YORK, } ss.
City & County of New York, }

Before me, Henry H. Whitman, a notary public in and for said county of New York, duly qualified, personally appeared Frederick P. Olcott, George S. Ellis, Henry E. Malin, Frank W. Emery, Frank L. Grant, James N. Wallace, Milton Ferguson, John Q. Adams, Jr., Philip A. Babcock, William H. Ludlum, and Benjamin G. Mitchell, known to me to be all of the persons whose names are subscribed to the foregoing instrument, and each for himself acknowledged to me that he executed the same for the purposes and consideration therein contained.

Given under my hand and seal of office this 24th day of July, A. D. 1889.

[L. S.] (Signed) HENRY H. WHITMAN,
Notary Public, N. Y. Co.

STATE OF NEW YORK, } ss.
City & County of New York, }

I, Edward F. Reilly, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that Henry H. Whitman, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same, and further that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 24th day of July, 1889.

[L. S.] (Signed) EDWARD F. REILLY, *Clerk.*

154 STATE OF TEXAS, }
County of Harris. }

We, the undersigned directors, named in the articles of incorporation of the Houston & Texas Central Railroad Company, under oath declare that a stock subscription to the amount of one thousand dollars for every mile of said railroad so intended to be acquired and operated, as set forth in article II of said articles of incorporation hereto attached, has been in good faith subscribed, and that five per cent. of the amount subscribed has been actually paid to the directors in said articles.

(Signed) CHAS. DILLINGHAM.
J. G. P SUMNER.
E. W. CAVE.

Subscribed and sworn to before me this 31st day of July, A. D. 1889.

[L. S.] (Signed) T. BLAKE DUPREE,
Notary Public, Harris County, Texas.

Certificate.

ATTORNEY GENERAL'S OFFICE,
AUSTIN, *July 30th*, 1889.

This is to certify that the original articles of incorporation of the Houston & Texas Central Railroad Company were submitted to me on the 30th day of July, 1889, and that, having carefully examined the same, I find them in accordance with the provisions of chapter 1, title 84, of the Revised Statutes of Texas and not in conflict with the laws of the United States or of the State of Texas.

[L. S.] (Signed) J. S. HOGG,
Attorney General.

DEPARTMENT OF STATE.

155 I, Allison Mayfield, secretary of state of the State of Texas, do hereby certify that the foregoing is a true copy of the original charter of the Houston & Texas Central Railroad Company, with the endorsements thereon, as now appears of record in this department.

Witness my official signature and the seal of State affixed, [L. S.] at the city of Austin, this 16th day of January, A. D. 1896.

(Signed) ALLISON MAYFIELD,
Secretary of State.

3. In connection with the introduction of the foregoing copy of the articles of incorporation of defendant it was in open court admitted by defendant that, having been organized and existing under and by virtue of such articles of incorporation, defendant now and at the time of the institution of this suit was in possession and claimed under proper deeds of conveyance from F. P. Olcott, and under such charter to own and operate the railroad and property described in plaintiff's original petition.

4. It was admitted by defendant in open court that all payments made on account of the loan to the Washington County Railroad Company after that company was merged into the Houston & Texas Central Railway Company, in 1870, up to the time that such payments on account of the loan to the Washington County Railroad Company were discontinued, in 1879, were made by the Houston & Texas Central Railway Company; that all payments on account of the loan to the Houston & Texas Central Railway Company that were made after February, 1885, and prior to April, 1893, were made by receivers of the property and affairs of said railway company, and that all the payments on account of said loan paid subsequent to April first, 1893, were made by The Houston & Texas Central Railroad Company, the defendant in this case.

156 Plaintiff rested.

Defendant's Evidence.

1. Defendant first introduced, over the objection of the attorney general, an act of the legislature of the State of Texas entitled "An act for the relief of the Houston & Texas Central Railway Company," as follows, to wit, together with a certificate of the secretary of state appended to the same:

"Whereas, the Houston & Texas Central Railway Company has become the owner, by purchase, of the Washington County railroad; and,

Whereas, the Houston & Texas Central Railway Company and the Washington County Railroad Company are indebted to the State of Texas for sums borrowed from the special school fund; and,

Whereas, the Houston & Texas Central Railway Company is desirous to extend the Washington County branch to the city of Austin, as soon as it can be done, and to build its main trunk to Red river in the shortest time possible, and also to build a branch road from some point in Navarro county, so as to strike Red river at such a point as will enable said company to form a connection with any railroad that may be built southward, from Kansas or Missouri, to said river; and,

Whereas, the ability of said company to build said main trunk and branch roads would be greatly increased by the consent of the State to exchange the six per cent. bonds of the said companies, now held by the State, for the seven per cent. gold interest-bearing bonds of the said Houston & Texas Central Railway Company, issued by virtue of a deed of trust executed by said company on the 1st day of July, A. D. 1866, in which deed of trust Shepherd Knapp and David S. Dodge, of the city of New York, are named (and have accepted) as trustees; and,

157 Whereas, it is believed that such exchange can be made without in any manner endangering the security of the school fund; therefore,

SECTION 1. Be it enacted by the legislature of the State of Texas, That the Washington County railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston & Texas Central railway, and shall be under the control and management of the Houston & Texas Central Railway Company, in like manner as every other part of the said railway; and the Houston & Texas Central Railway Company shall have the right to build and extend the part of its railway, heretofore known as the Washington County railroad, from the town of Brenham, in the county of Washington, to the city of Austin, in the county of Travis, by the most eligible route to be selected by the engineers of the company; and the said company shall also have the right to build a branch road diverging from the main trunk at some point in Navarro county, and striking Red river at such point as will enable said railway company to make a connection with any railroad

which may be built to said river from the northward; and the said Houston & Texas Central Railway Company, by reason of the construction of the said railway from the town of Brenham to the city of Austin, and by reason of the construction of the said branch from Navarro county to Red river, shall have and enjoy all the rights, privileges, grants, and benefits that are now, or may at any time hereafter be secured to any railroad company in the State of Texas, by any general law of the State, and shall be subject, in respect of said railway and said branch, to all the duties and responsibilities imposed upon said Houston & Texas Central Railway Company by its charter, and by other laws of the State.

Sec. 2. For the whole amount of principal and interest due to the State by the Houston & Texas Central Railway Company, and
158 the Washington County Railroad Company, on the first day of July, A. D. 1870, the governor of the State shall accept and receive from the Houston & Texas Central Railway Company the seven per cent. land-grant sinking-fund first-mortgage, gold interest-bearing bonds of said company, which said bonds, also payable in gold, are issued, or to be issued *to* by virtue of a deed of trust executed by the said company on the first day of July, A. D. 1866, and mature on the first day of July, A. D. 1891, the interest on which is payable on the first days of January and July of each year, in which deed of trust Shepherd Knapp and David S. Dodge, of New York, were named and accepted as trustees; and the governor shall, after making the exchange of bonds herein provided for, cancel and deliver to said railway company, the six per cent. bonds of the Houston & Texas Central Railway Company, and of the Washington County Railroad Company, now held by the State for sums borrowed from the school fund; and the settlement and exchange of bonds herein provided for, shall be made at any time that may be agreed upon by the governor and the said railway company, between the passage of this act and the first day of December, A. D. 1870; and in making the settlement herein provided for, the Houston & Texas Central Railway Company shall be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865, by the said company and by the Washington County Railroad Company, upon the accounts on which said sums were respectively paid by said companies, the said sums amounting in the aggregate to one hundred and fifty-two thousand eight hundred and sixty-four dollars and fifty-five cents; provided that the said Houston & Texas Central Railway Company shall never issue an amount of the seven per cent. bonds above described to exceed twenty thousand dollars to the mile of completed road, including such bonds as have been already issued; nor shall said company ever issue any other bond that shall rank as a first-mortgage bond on its road, without first paying the whole amount of the indebtedness of the company to the State.

159 Sec. 3. The said Houston & Texas Central Railway Company is hereby authorized—any former laws to the contrary notwithstanding—to build its road through the counties of Limestone and Navarro, on the most eligible route, to be designated by

its engineers; provided, that the main trunk of said railway shall pass through the county of Dallas, and to a point on Red river within fifteen miles of Preston, as is now required by law, and shall be built as fast as the branch.

SEC. 4. No forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston & Texas Central Railway Company, by reason of its failure to comply with the conditions as to construction, imposed by the first section of the act of the twenty-first of September, A. D. 1866, entitled "An act granting lands to the Houston & Texas Central Railway Company;" but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions embraced in the first section of the said act of the twenty-first of September, A. D. 1866, had been, in all respects complied with; provided, that the land grant to said company shall cease, unless the said company shall complete their main trunk, east of the Brazos river, to Richland creek, in Navarro county, within twelve months from the first of October, A. D. 1870, and shall also complete their road to the city of Austin within two years after the passage of this act.

SEC. 5. The branch road from Navarro county to Red river, provided for in the first section of this act, shall be, to all intents and purposes in law, a part of the Houston & Texas Central railway, and shall be under the control and management of the said Houston & Texas Central Railway Company, in like manner as every other part of the said railway.

SEC. 6. All laws and parts of laws now in force concerning the Houston & Texas Central Railway Company, or the Washington County Railroad Company, not in conflict with the foregoing provisions, shall not be affected by the passage of this act; but the State shall always have the right to interfere, by such legislation as may be thought necessary, to prevent neglect on the part of the said Houston & Texas Central railway, so that the same may always remain an adequate security to the State for the amount that may be due by the company.

160

SEC. 7. This act shall take effect from and after its passage.

(Signed) IRA H. EVANS,
Speaker House of Representatives.

(Signed) DON CAMPBELL,
President of the Senate.

Passed by house of representatives July 18th, 1870.

(Signed) JNO. G. BOYLE,
Chief Clerk H. R.

Passed the senate July 28th, 1870.

(Signed) C. C. ALLEN,
Secretary of the Senate.

Received August 2nd, 1870, at 11.30 a. m.

(Signed) EDM'D J. DAVIS, *Governor.*

Vetoed by the governor Aug. 6th, 1870.

This bill was brought to the office of the secretary of state by John G. Boyle, chief clerk of the house of representatives, on the 30th day of August, A. D. 1870, and deposited with me.

(Signed) JAS. P. NEWCOMB,
Secretary of State,
Per J. E. OLDRIGHT,
Chief Clerk and Acting Secretary of State.

On this day August 6th, 1870, the house passed this bill over the veto of the governor.

(Signed) JNO. G. BOYLE,
Ch'f Cl'k H. Rep.

161 August 15th, 1870.—Reconsidered and passed, notwithstanding the objection of his excellency the governor.

(Signed) C. C. ALLEN,
Secretary of Senate.

In the house of representatives, Austin, Texas.

AUGUST 6TH, 1870.

The governor of the State of Texas having returned to the house of representatives, in which it originated, the bill entitled "An act for the relief of the Houston & Texas Central Railway Company," with his objections thereto, the house of representatives proceeded, in pursuance of the constitution, to reconsider the same, and resolved that the bill do pass, two-thirds of the house of representatives agree to pass the same.

Attest:

(Signed) JNO. G. BOYLE,
Chief Clerk H. R.

[Written across the face in red ink:] This certificate, though it is dated the 6th day of August, 1870, was actually appended on the 29th day of August, A. D. 1870. (Signed) Jno. G. Boyle, ch'f cl'k H. Rep.

In the senate of the State of Texas.

AUGUST 15TH, 1870.

The senate having proceeded in pursuance of the constitution to reconsider the bill entitled "An act for the relief of the Houston & Texas Central Railway Company," returned to the house of representatives by the governor with his objections and sent by the house of representatives to the senate with the message of the governor returning the bill:

Resolved, That the bill do pass, two-thirds of the senate agreeing to pass the same.

Attest:

(Signed) C. C. ALLEN,
Secretary of the Senate.

[Written across the face in red ink:] This certificate, though it is dated the 5th Aug., date of adjournment, was actually appended on the 29th day of Aug., 1870. (Signed) C. C. Allen, secretary of senate.

THE STATE OF TEXAS, }
Department of State. }

I, Allison Mayfield, secretary of state of the State of Texas,
162 do hereby certify that the within and foregoing is a true and correct copy of a certain instrument in writing, with the endorsements thereon, found among the original enrolled special laws of the twelfth legislature of the State of Texas, said original enrolled laws and said instrument of writing being bound together in one volume and the volume entitled "Special Laws of Texas," vol. 2, "Twelfth Legislature, 1870."

Said instrument of writing, of which the within and foregoing is a true copy, purporting to be an original enrolled bill passed by the twelfth legislature of the State of Texas, entitled "An act for the relief of the Houston & Texas Central Railway Company."

I further certify that there is endorsed on said instrument of writing the following certificate:

"In the house of representatives, Austin, Texas.

AUGUST 6TH, 1870.

The governor of the State of Texas having returned to the house of representatives, in which it originated, the bill entitled "An act for the relief of the Houston & Texas Central Railway Company," with his objections thereto—

The house of representatives proceeded in pursuance of the constitution to reconsider the same, and resolved that the bill do pass, two-thirds of the house of representatives agree- to pass the same.

Attest:

(Signed) JNO. G. BOYLE,
Chief Clerk H. R.

And that across said certificate there is an endorsement in red ink as follows:

"This certificate, though it is dated the 6th day of August, 1870, was actually appended on the 29th day of August, A. D. 1870.

(Signed) JNO. G. BOYLE,
Ch'f Cl'k H. Rep."

163 That there is endorsed on said instrument of writing the following certificate:

"In the senate of the State of Texas.

AUGUST 15TH, 1870.

The senate having proceeded, in pursuance of the constitution, to reconsider the bill entitled 'An act for the relief of the Houston & Texas Central Railway Company,' returned to the

house of representatives by the governor with his objections and sent by the house of representatives to the senate with the message of the governor returning the bill:

Resolved, That the bill do pass, two-thirds of the senate agreeing to pass the same.

Attest:

(Signed) C. C. ALLEN,
Secretary of the Senate."

And across said certificate, written in red ink, is the following:

"This certificate, though it is dated the 15th Aug. (date of adjournment), was actually appended on the 29th day of Aug., 1870.

(Signed) C. C. ALLEN,
Secretary of Senate."

The said original instrument of writing being now on file in this department.

Witness my official signature and the seal of State affixed, (L. S.) at the city of Austin, this the 30th day of January, A. D. 1896.

(Signed) ALLISON MAYFIELD,
Secretary of State.

Counsel for plaintiff objected to the introduction of the foregoing act upon the grounds, substantially, that the certificates of the clerk of the house and secretary of the senate were not sufficient to show the passage of the bill originally; (2) that the memo-
164 randa on the bill shows that it was vetoed by the governor on August 6th, 1870, and there is no certificate from the clerk of the house or secretary of the senate to show that the bill was passed by the requisite two-thirds majority over the veto of the governor, and (3) that the certificates show that they were made after the adjournment of the legislature, and that the bill was not deposited in the secretary of state's office until after the adjournment of the legislature.

Before said objections were ruled on by the court counsel for defendant offered, over the objection of the attorney general, in connection with said act duly authenticated copies from the journals of the house of representatives showing the passage of said bill, over the veto of the governor, by the necessary two-thirds vote as follows:

Extract from the House Journal, Twelfth Legislature, Page 487.

Mr. Stockbridge introduced a bill to be entitled "An act for the relief of the Houston & Texas Central Railway Company."

Bill read first time and referred to committee on internal improvements.

Page 562.

Hon. Ira H. Evans, speaker of the house of representatives.

SIR: Your committee on internal improvements, to whom was referred house bill No. 350, entitled "An act for the relief of the Houston & Texas Central Railway Company," have carefully considered the same and instructed me to report said bill, with accompanying amendments, to the house, with the recommendation that it pass.

Your committee are of the opinion that the exchange of bonds provided for in said bill will not only be safe, but to the advantage of the State, while it will enable the company to use a large sum in the construction of their roads.

165 Your committee deem it but simple justice to the company, undr existing circumstances, to grant it the right to build a a road from Brenham to Austin and to make the whole road from Hempstead to Austin a part of the Central railway.

Your committee are of the opinion that the Houston and Texas Central Railway Company has already done much to develop the resources of the State and to attract capital to Texas as a great theatre for enterprise, and that the company is entitled to the confidence of the State and to all the relief in the bill.

Very respectfully,

(Signed) C. B. MORRIS,
Chairman pro Tem. of Committee.

Report and bill passed to orders of the day.

* * * * * * *

Page 609.

Mr. Cooper moved a suspension of the rules to take up out of its regular order house bill No. 350, to be entitled "An act for the relief of the Houston and Texas Central Railroad Company."

Upon which the yeas and nays were demanded by Messrs. Robinson, Lacy, and Burnett, and resulted as follows:

Yeas—Messrs. Austin, Abbott of Austin, H. R. Allen, Richard Allen, Becton, Burley, Booty, Chambers, Cooper, Cotton, Camp, Dupree, Ellis, Franks, Gaston, Gardinet, George, Harn, Hamilton, Johnson, Jenkins, Kyle, Kendall, Lacy, Lane, Leonard, Moore of Harrison, Morris, Mitchell, Miller, Pusey, Pierson, Plumley, Schulte, Sheriff, Simmons, Sinclair, Slaughter, Smyth, Stirman, Stockbridge, Shelburne, Van Noy, Weaver of Hunt, Williams of Walker, Weaver of Johnson, York, Youngkin—48.

Nays—Messrs. Speaker, Abbott, Abbott of Hill, Burnett, Cox, Davis, Dorris, Grothaus, Hawkins, Locke, Lyons, Manning, Morrison, McLean, McKee of Guadalupe, Nedlock, Moore of Red River, Prissick, Robinson, Schlotman, Spencer, Tegener, Williams of Colorado, Zapp, Zoeller—24.

166 So the rules were suspended and the bill read the second time.

* * * * * * *

Page 645.

Mr. Schultze moved a suspension of the rules to take up out of its regular order house bill No. 350, to be entitled "An act for the relief of the Houston & Texas Central Railroad Company," upon which motion the yeas and nays were called for by Messrs. Burnett, Robinson, and Schultze, and resulted as follows:

Yeas—Messrs. Austin, Abbott of Austin, H. R. Allen, R. Allen, Abbott of Hill, Becton, Burley, Booty, Chambers, Cooper, Cotton, Camp, Dupree, Dorris, Ellis, Franks, Gardner, Grothaus, Harn, Hamilton, Haswell, Hawkins, Jenkins, Kyle, Kendall, Lacy, Lane, Leonard, Morrison, Moore of Harrison, Morris, McLean, McKee of Guadalupe, Mitchell, Mullins, Miller, Posey, Pierson, Plumly, Ross, Schlickum, Schlotman, Schultze, Sinclair, Slaughter, Smyth, Stirman, Stockbridge, Shelburne, Tinsley, Van Noy, Weaver of Hunt, Weaver of Johnson, York, Zapp—56.

Nays—Messrs. Speaker, Burnett, Davis, George, Lyons, Manning, Nedlock, Robinson, Williams of Walker, Williams of Colorado, Youngkin, Zoeller—12.

So the rules were suspended.

(Mr. McLean in the chair.)

The following amendments, recommended by the committeee on internal improvements, were adopted:

Insert after the figures 1866, in line seven, section two, as follows: "and mature on the first day of July, 1891, the interest on which is payable on the first days of January and July of each year."

Add to the end of section three the following: "and shall be built as fast as the branch."

On motion of Mr. Slaughter, the house resolved itself into committee of the whole for the consideration of the bill.

167 (Mr. McLean in the chair.)

1.25 P. M.

The committee rose. The chairman reported the committee had had under consideration the bill for the relief of the Houston and Texas Central Railway Company, and recommended the passage of the same with certain amendments, and asked that the committee be discharged from further consideration of the subject.

Report accepted and committee discharged.

The following amendment, recommended by committee of the whole, on motion of Mr. Sinclair, was laid on the table:

In section two, line seventeen, after the words "allowed a," insert the word "temporary."

The following amendment was recommended by the committee of the whole:

Add the following to section four: "and provided further, that upon the completion of the main track to Richland Creek and to the city of Austin, within the time specified in this section, then the amount of $152,864.55 paid by the Texas Central Railway Company and Washington County railroad, in the treasury warrants of the State in 1864 and 1865, shall be an absolute credit to said Houston & Texas Central Railway Company."

Mr. Sinclair moved to lay the amendment on the table, upon which the yeas and nays were called for by Messrs. Slaughter, Cooper, and McLean, and resulted as follows:

Yeas—Messrs. H. R. Allen, Richard Allen, Becton, Burley, Burnett, Bonner, Cooper, Camp, Dupree, Ellis, Franks, Gaston, Gardiner, Grothaus, George, Hughes, Harn, Hamilton, Haswell, Hawkins, Johnson, Jenkins, Kyle, Kendall, Lacy, Lane, Leonard, Looke, Lyons, Manning, Morrison, Moore of Harrison, Morris, Mullins, Miller, Posey, Pierson, Plumley, Robb, Ross, Schlickum, Schlotman, Schultze, Sheriff, Sinclair, Smyth, Stockbridge, Tegner, Tinsley Van Noy, Weaver of Johnson, York, Zapp, Zoeller—54.

168 Nays—Messrs. Austin, Abbott of Austin, Abbott of Hill, Booty, Davis, Dorris, McLean, McKee of Guadalupe, Mitchell, Moore of Red River, Prissick, Slaughter, Stirman, Shelburne, Weaver of Hunt, Williams of Walker, Youngkin—18.

So the amendment was laid on the table.

Mr. R. L. Moore moved that the house adjourn. Lost.

Mr. Franks moved that the bill be ordered to be engrossed and read the third time, upon which motion the yeas and nays were called for by Messrs. Burnett, Davis, and Robinson, and resulted as follows:

Yeas—Austin, Abbott of Austin, H. R. Allen, R. Allen, Abbott of Hill, Becton, Burley, Booty, Bonner, Cooper, Cotton, Camp, Dupree, Dorris, Ellis, Franks, Gaston, Gardiner, Harn, Hamilton, Haswell, Hawkins, Johnson, Jenkins, Kendall, Lacy, Lane, Leonard, Morrison, Moore of Harrison, Morris, McLean, McKee of Guadalupe, Mitchell, Mullins, Miller, Moore of Red River, Posey, Pierson, Robb, Ross, Schlickum, Schlotman, Schutze, Sheriff, Sinclair, Slaughter, Smyth, Stirman, Stockbridge, Shelburne, Tegener, Tinsley, Van Noy, Weaver of Hunt, Williams of Walker, Weaver of Johnson, York, Zapp—60.

Nays—Messrs. Burnett, Davis, Grothaus, George, Locke, Lyons, Manning, Medlock, Prissick, Youngkin, Zoeller—11.

So the bill was ordered to be engrossed and read the third time.

Mr. Plumley moved a suspension of the rules to put the bill on its final passage, upon which motion the yeas and nays were called for by Messrs. Burnett, Robinson, and Davis, and resulted as follows:

Yeas—Austin, Abbott of Austin, Allen, H. R.; Allen, Richard; Abbott of Hill, Becton, Burley, Booty, Bonner, Cooper, Cotton, Camp, Dupree, Dorris, Ellis, Franks, Gaston, Gardiner, Harn, Hamilton, Haswell, Hawkins, Johnson, Jenkins, Kyle, Kendall, Lacy, Lane, Leonard, Morrison, Moore of Harrison, Morris, McLean,

169 Mitchell, Mullins, Miller, Posey, Pierson, Plumley, Robb, Ross, Schlickum, Schlotman, Schutze, Sheriff, Sinclair, Slaighter, Smyth, Stirman, Stockbridge, Shelburn, Tegener, Tinsley, Van Noy, Weaver of Hunt, Williams of Walker, Weaver of Johnson, York, Zapp—59.

Nays—Messrs. Burnett, Davis, Grothaus, George, Hughes, Locke, Lyons, Manning, McKee of Guadalupe, Medlock, Moore of Red River, Prissick, Robinson, Youngkin, Zoeller—15.

So the rules were suspended, and the bill was read the third time.

Mr. Burnett moved that the house adjourn. Lost.

The question being on the passage of the bill, yeas and nays were called for by Messrs. Burnett, Robinson, and Davis, and resulted as follows:

Yeas—Messrs. Austin, Abbott of Austin, H. R. Allen, R. Allen, Abbott of Hill, Becton, Burley, Booty, Bonner, Cooper, Cotton, Camp, Dupree, Dorris, Ellis, Franks, Gaston, Gardiner, Hughes, Harn, Hamilton, Haswell, Hawkins, Johnson, Jenkins, Kyle, Kendall, Lacy, Lane, Leonard, Morrison, Moore of Harrison, Morris, McLean, Mitchell, Mullins, Moore of Red river, Miller, Posey, Pierson, Plumley, Robb, Ross, Schlickum, Schlotman, Schutze, Sheriff, Sinclair, Slaughter, Smyth, Stirman, Stockbridge, Shelburne, Tegener, Tinsley, Van Noy, Weaver of Hunt, Williams of Walker, Weaver of Johnson, York, Zapp—61.

Nays—Speaker, Burnett, Davis, Grothaus, George, Locke, Lyons, Manning, J. F. McKee, Medlock, Prissick, Robinson, Youngkin, Zoeller—14.

So the bill passed and its title was agreed to.

* * * * * * *

Page 791.

Mr. Schutze moved a suspension of the rules to take up house bill No. 350, to be entitled "An act for the relief of the Houston & Texas Central Railway Company."

170

Rules suspended, and the house agreed to the following senate amendment:

Amend section three: After the word "Dallas" and before the word "as," in fifth line, insert "and to a point on Red river within fifteen miles of Preston."

* * * * * * *

Page 891.

EXECUTIVE OFFICE, AUSTIN, *August* 6, 1870.

Hon. Ira H. Evans, speaker of the house of representatives.

SIR: I feel it my duty to return to your house, where it originated, "An act for the relief of the Houston & Texas Central Railway Company," and ask that the same be reconsidered.

* * * * * * *

Respectfully,

(Signed) EDMUND J. DAVIS, *Governor.*

Page 894.

Mr. Hughes moved that the consideration of the governor's message be made the special order for Tuesday next, at 10 o'clock a. m., and that the message be printed.

Mr. B. F. Williams moved a call of the house.

Call sustained.

Absent: Messrs. Posey, Robinson, and Tinsley.

Mr. Robinson was excused from attendance for the day.

On motion of Mr. B. F. Williams, the sargeant-at-arms was dispatced for the absentees.

Mr. Burnett moved a suspension of the call of the house.

Call suspended.

The question recurring on the motion of Mr. Hughes, it was lost.

* * * * * * *

171 Page 895.

(Mr. Burnett in the chair.)

The question being "Will the house, on reconsideration, pass the bill?" the yeas and nays, being taken, resulted as follows:

Yeas—Messrs. Austin, Abney, C. L. Abbott, H. R. Allen, R. Allen, Jo Abbott, Becton, Burley, Booty, Bonnor, Cooper, Cotton, Camp, Dorris, Ellis, Franks, Gaston, Gardiner, George, Hamilton, Haswell, Johnson, Jenkins, Kyle, Kendall, Lacy, Lane, Leonard, Henry Moore, McLean, Miller, Posey, Pierson, Plumley, Ross, Schlickum, Schlotman, Schutze, Sheriff, Simmons, Sinclair, Slaughter, Stirman, Stockbridge, Shelburne, Tegener, S. S. Weaver, J. C. Weaver, Young, York—50.

Nays—Speaker Burnett, Chambers, Cox, Dupree, Davis, Grothaus, Hughes, Harn, Locke, Morrison, J. F. McKee, Mitchell, Mullins, Medlock, Prissick, Robinson, Smyth, R. Williams, B. F. Williams, Youngkin, Zapp, Zoeller—23.

So the house, on reconsideration, passed the bill.

* * * * * * *

THE STATE OF TEXAS,
DEPARTMENT OF STATE.

I, Allison Mayfield, secretary of state of the State of Texas, do hereby certify that the within and foregoing are true copies of extracts from the house journal of the twelfth legislature of the State of Texas, which convened in the city of Austin April 26th, 1870, and adjourned August 15, 1870.

Witness my official signature and the seal of State, affixed at the city of Austin, this the 18th day of January, A. D. 1896.

[SEAL.] (Signed) ALLISON MAYFIEED,
Secretary of State.

172 *Extracts from Senate Journal, Twelfth Legislature.*

Page 108.

Senator Baker introduced a bill entitled "An act for the relief of the Houston & Texas Central Railway Company."

Read first time.

Referred to committee on internal improvements.

Page 398.

SENATE CHAMBER,
AUSTIN, TEXAS, WEDNESDAY, *July* 20, 1870.

Message from the house with its action—house bill No. 433.

Also house bill No. 350, "An act for the relief of the Houston & Texas Central Railway Company."

Page 472.

On motion of Senator Baker, the rules were suspended to take up house bill No. 350, "An act for the relief of the Houston & Texas Central Railway Company."

Bill read first time. Rules suspended and bill read second time.

Senator Broughton offered the following amendment:

Amendment, section three, to come in after the words "Dallas" and before the word "as," in fifth line—insert "and to a point on Red river within fifteen miles of Preston."

Adopted.

Rules suspended and bill read third time.

Yeas and nays taken on final passage.

Yeas—Mr. President, Baker, Bell, Bowers, Broughton, Clark, Cole, Dohoney, Flanagan, Ford, Fountain, Gaines, Mills, Parsons, Pickett, Pridgen, Pyle, Rawson, Ruby, Saylor, Shannon—21.

173 Nays—Douglass, Evans, Hall, Hertzberg, Pettit, Priest—6.

Absent—Latimer.

Bill passed.

Page 458.

Message from the house informing the senate the speaker had signed in open session enrolled bills.

Also that the house had concurred in senate amendment to house bill No. 350.

Page 510.

Message from the house informing the senate the speaker had signed in open session enrolled bill "An act for the relief of the Houston and Texas Central Railway Company."

Page 579.

Message from the house informing the senate the house had passed house bill.

Page 580.

Also informing the senate that the house, on reconsideration, had passed "An act for the relief of the Houston & Texas Central Railway Company," vetoed by the governor August 6, 1870.

Page 698.

On motion of Senator Baker, the rules were suspended to take up the governor's veto message on "An act for the relief of the Houston & Texas Central Railway Company."

Senator Hall moved a call of the senate.
Senator Brown moved the previous question.
Previous question seconded.

Main question ordered, which being "Shall the bill pass,
174 notwithstanding the objections of his excellency the governor?"

Yeas and nays taken.

Yeas—Mr. President, Alford, Baker, Bell, Bowers, Broughton, Clark, Cole, Dohoney, Douglass, Flanagan, Ford, Gaines, Mills, Parsons, Pickett, Pridgen, Pyle, Rawson, Ruby, Shannon—21.
Nays—Evans, Hall, Hertzberg, Priest—4.
Absent—Fountain, Latimer, Pettit, Saylor—4.
The senate, on reconsideration, passed the bill.

THE STATE OF TEXAS,
DEPARTMENT OF STATE.

I, Allison Mayfield, secretary of state of the State of Texas, do hereby certify that the within and foregoing are true copies of extracts from the senate journal of the twelfth legislature of the State of Texas, which convened in the city of Austin, April 26th, 1870, and adjourned August 15, 1870.

Witness my official signature and the seal of State, affixed at the city of Austin, this the 21st day of January, A. D. 1896.

(Signed) ALLISON MAYFIELD,
Secretary of State.

Copy.

Defendant next introduced a duly authenticated transcript from the books of the comptroller's office showing the account of the Houston & Texas Central Railway Company respecting the loan described in plaintiff's petition to the Houston & Texas Central Railway Company as said account stood on the books of the comptroller's department on the first day of May, 1870, as follows, to wit:

Houston & Texas Central Railroad Company.

1857.				1858.				
April 14	To James H. Raymond, school fund.	76	150,000.00	Mar. 1	By dep. warr't No. 1.....	3227	162	7,915.00
Oct. 28	" " "	136	60,000.00	Mar. 1	" " 1.....	3328	"	1,240.00
1858.				April 14	" " S.....	3343	164	3,000.00
May 31	To sundries.....	211	60,000.00					
July 6	"	"	30,000.00					

Date of loan.			Principal.	Interest.	Date of payment.			Principal.	Interest.
1857.					1858.				
April 13	To journal.....	76	150,000.00		Mar. 1	By w't No. 3327.....	162	.....	7,915.00
Oct. 28	"	136	60,000.00		Mar. 1	" " 3328.....	"	.....	1,240.00
1858.					Apr. 14	" " 3343.....	164	3,000.00	
May 31	"	211	60,000.00		Nov. 4	" " 3532.....	230	1,200.00	
July 6	"	211	30,000.00		1859.				
1859.					Feb. 12	" " 3573.....	250	.....	9,000.00
Feb. 23	"	254	30,000.00		Feb. 12	" " 3574.....	"	.....	3,600.00
June 15	"	324	30,000.00		Feb. 12	" " 3575.....	"	.....	1,350.00
July 22	"	"	30,000.00		Feb. 12	" " 3576.....	"	.....	1,350.00
Aug. 2	"	"	30,000.00		Feb. 12	" " 3577.....	"	.....	1,168.76
Aug. 20	"	"	30,000.00		Feb. 28	" " 3601.....	251	.....	25.00
1864.					April 12	" " 3648.....	261	3,000.00	
Dec. 31	To interest.....	167	.....	153,575.56	May 31	" " 3685.....	267	1,200.00	
" "	To balance.....	.....	.....	2,000.00	July 5	" " 3802.....	299	600.00	
					Nov. 1	" " 26.....	337	1,200.00	

177

Date of loan.			Principal.	Interest.
Dec'r 31 1865.	To balance		432,000.00	
Mar. 1	To interest	173		25,920.00
1866. April —	" "	198		25,920.00
			432,000.00	51,840.00

178

Date of payment.			Principal.	Interest.
1860. Dec'r 31	To balance		432,000.00	
Dec'r 31 1866.	Balance			2,000.00
May 31	Bal. to Led. C	199	432,000.00	49,840.00
			432,000.00	51,840.00

Date of payment.			Principal.	Interest.
1860. Feb. 13	By w't No. 82	347	600.00	
Mar. 1	" " 105	352		24,152.45
Ap'l 13	" " 123	368	3,000.00	
May 31	" " 172½	377	1,200.00	
June 15	" " 186	"	600.00	
July 10	" " 242	382	600.00	
Aug't 31	" " 328	414	1,800.00	
1864. Jan'y 20	" " 905	105		23,466.76
Mar. 30	" " 907	109		6,670.00
April 19	" " 908	110		15,009.92
April 19	" " 909	110		4,000.00
July 13	" " 915	136		31,660.69
Aug't 20	" " 918	147		2,000.00
Aug't 24	" " 922	"		22,966.98
Dec'r 31	To balance		432,000.00	
			450,000.00	155,575.56

Houston & Texas Central railroad.

Dr.			Principal.	Interest.	Cr.		Principal.	Interest.
1866.					1866.			
Octo. 31	To bal. from Led. B.....	54	432,000.00	49,840.00	Dec'r 31	By S. F. D. W. No. 559.....	.....	2,855.00
March 1	To in'st on R. R. B.....	82	.....	25,920.00	1867.			
1868.					Jan. 1	By D. W. No. 861.....	.....	3,375.00
July 31	To int. on R. R. B.....	188	.....	25,920.00	April 23	" " " 1497.....	.....	10,830.00
1869.					May 4	" " " 1598.....	.....	10,500.00
March 1	" " "	141	.....	25,920.00	May 24	" " " 16 ".....	.....	4,500.00
1870.					Dec. 31	" " " 22149.....	.....	6,230.00
"	" " "	302	.....	25,920.00				

181 Journal "A." No. 3.

Page 76. COMPTROLLER'S OFFICE, *April*, 1857.

322 Houston & Texas Central railroad.
14 To James H. Raymond, treasurer, "general school fund:"
Am't loaned that road under the provisions of an act passed 13th August, 1856, to wit:
In U. S. bonds..... 141,000.00
In specie..... 9,000.00

For which their bonds were substituted bearing 6%, payable 10 years from 14th April, 1857, the date of said loan..... 150,000.00

Page 136. COMPTROLLER'S OFFICE, *October*, 1857.

322 Houston & Texas Central railroad.
To James H. Raymond, treasurer, "school fund:"
Am't loaned said company 28th October, 1857, to wit:
In U. S. bonds..... 56,000.00
In specie..... 4,000.00

60,000.00

Page 162. COMPTROLLER'S OFFICE, *March*, 1858.

4–1 Cash accs. to sundries.
322 "Houston & Texas Central Railway Co.:"
Am't of interest on bond for $150,000.00 paid in by S. M. Swenson on acc't of said company March 1, '58, from 14th April, 1857, to
182 date, at 6%, and deposited in the treasury, as per warrant No. 3327..... 7,915.00
Am't of interest on bond for $60,000.00 also paid in by S. M. Swenson on acc. of same company from 28th October, 1857, to March 1, '58, at 6 %, and deposited in the treasury, as per warrant No. 3328..... 1,240.00

Page 164. COMPTROLLER'S OFFICE, *April*, 1858.

1–4 Cash accs. to sundries.
322 "Houston & Texas Central Railway Company:"
Am't of 2% sinking fund paid in by S. M. Swenson on their acc't on bond — $150,000.00, dated April 14, '57, as per deposit warrant No. 3343, dated April 14, '58..... 3,000.00

No. 5.

Page 211. COMPTROLLER'S OFFICE, *August*, 1858.

322	Houston & Texas Central Railway Company to sundries.			
	James H. Raymond, treasurer, "school fund, in U. S. bonds:			
	Am't loaned said company May 31, '88, from this fund on their two bonds of $30,000.00 each.....	58,000.00		
	Am't loaned said company July 6, '58, from same fund on their bond for $30,000.00.....	29,000.00		
			87,000.00	
	James H. Raymond, treasurer, "school fund, in specie:"			
	Am't loaned said company May 31, '58, from this fund to complete the loans of this date.....	2,000.00		
	" " " of July 6, '58....	1,000.00		
			3,000.00	
				90,000.00

183

Page 230. COMPTROLLER'S OFFICE, *November*, 1858.

1–4	Cash accs. to sundries. School fund.		
322	"Houston & Texas Central Railway Co.:"		
	Am't of 2% sinking fund paid by Swenson & Swisher for said company on their bond executed 28th Oct., 1857, for $60,000.00, as per warrant No. 3532, Nov. 4, '58.....		1,200.00

Page 250. COMPTROLLER'S OFFICE, *February*, 1859.

1–4	Cash accs. to sundries. School fund.		
	Houston & Texas Central Railway Co.:		
	Am't of 12 mos.' int. on bond dated March 25, '57, for $150,000.00, due March 1, '59, deposited by Swenson and Swisher, Feb'y 12, '59, as per warrant No. 3573.....		9,000.00
	Am't of 12 mos.' int. on bond dated Sept. 23, '57, for $60,000, due same time, deposited as above, as per warrant No. 3574.....		3,600.00
	Am't of 9 mos.' int. on bond dated Jan'y 28, '58, for $30,000, from June 1, '58, to March 1, '59, deposited as above, as per warrant No. 3575.....		1,350.00
	Am't of 9 mos.' int. on bond for $30,000.00, dated Feb. 28, '58, from June 1, '58, to March 1, 59, deposited as above, as per warrant No. 3576.....		1,350.00
	Am't of seven mos. & 25 days' int. on bond for $30,000, dated Feb. 23, '58, from July 6, '58, to March 1, '59, deposited as above, as per warrant No. 3577.....		1,168.76

184 No. 5.

Page 251. COMPTROLLER'S OFFICE, *February*, 1859.

1–4 Cash accs. to sundries. School fund.
322 " Houston & Texas Central Railroad Company:"
Am't of 5 days' int. on bond dated Jan. 25, '59, for $30,000.00, from Feb. 23, '59, to March 1, '59, and deposited Feb. 28, '59, as per warrant No. 3601.. 25.00

Page 254. COMPTROLLER'S OFFICE, *February*, 1859.

348 Sundries to C. H. Randolph, treasurer, "school fund, in bonds:"
322 Houston & Texas Central Railway Company:
Am't loaned said company in U. S. 5% bonds on their bond for $30,000.00, dated Feb. 23, '59.... 29,000.00

347 Sundries to C. H. Randolph, treasurer, "school fund, in specie."
322 Houston & Texas Central Railway Company:
Am't loaned this company in specie to complete the above loan of $30,000.00..... 1,000.00

Page 261. COMPTROLLER'S OFFICE, *April*, 1859.

1–4 Cash acc't to sundries. School fund.
322 Houston & Texas Central Railway Company:
Am't of 2% sinking fund paid in by Swenson & Swisher, Apr. 12, '59, as per warrant No. 3648.. 3,000.00

Page 267. COMPTROLLER'S OFFICE, *May*, 1859.

1–4 Cash accs. to sundries.
322 Houston & Texas Central Railway Co.:
Am't of 2 % sinking fund paid in by them through Messrs. Swenson & Swisher on loan of $60,000.00 made May 31, '58, paid in May 31, '59, as per deposit warrant No. 3685..... ..... 1,200.00

185

Page 299. COMPTROLLER'S OFFICE, *July*, 1859.

Cash accs. to sundries.
Houston & Texas Central Railway Co.:
Am't of 2 % sinking fund paid in July 5, '59, on loan of July 6, '58, for $30,000, and deposited as per w't No. 2802..... 600.00

No. 6.

Page 324. COMPTROLLER'S OFFICE, *August*, 1859.

347 Sundries to C. H. Randolph, treasurer, "school fund, in specie."
322 Houston & Texas Central Railway Co.:
Am't of specie loaned this company on their four several bonds for $30,000.00 each, 15th and 22nd July and 2nd and 20th August, 1859..... 4,000.00

Sundries to C. H. Randolph, treasurer, "school fund, in bonds."
Houston & Texas Central Railway Co.:
Am't of U. S. bonds loaned said company on their four several bonds for $30,000.00 each, dated respectively May 14, '59; June 22, '59; July 20, '59, and July 29, '59..... ..... 116,000.00

186

Page 337. COMPTROLLER'S OFFICE, *November*, 1859.

Cash acc., "2 % sinking fund."
To Houston & Texas Central Railway Co.:
Am't deposited by Swenson & Swisher Nov. 1, '59, as per warrant No. 26..... 1,200.00

Page 347. COMPTROLLER'S OFFICE, *February*, 1860.

3 Cash acc., "2 — sinking fund."
322 To Houston & Texas Central Railway Co.:
Am't of 2 % sinking fund paid in by S. M. Swenson Feb. 23, '60, as per warrant No. 82 on loan of $30,000 made Feb. 23, '59... ..... 600.00

Page 352. COMPTROLLER'S OFFICE, *March*, 1860.

5 Cash acc., "school fund, in specie," to sundries (etc.)
Houston & Texas Central Railway Co.:
Am't deposited March 16, '60, as per warrant No. 105, being interest at 6 % to March 1, '60, on the following loans, viz.:

Loan of	April	13, '57,	of	$150,000,	one year.....	$9,000.00
"	" Oct.	28, '57,	of	60,000	"	3,600.00
"	" May	31, '58,	of	60,000	"	1,800.00
"	" "	" "	"	60,000	"	1,800.00
"	" July	6, '58,	"	60,000	"	1,800.00
"	" Feb.	23, '59,	"	60,000	"	1,800.00
"	" June	15, '59,	"	60,000	259 days.....	1,273.77
"	" July	23, '59,	of	60,000	222 "	1,091.80
"	" Aug.	2, '59,	of	60,000	211 "	1,037.70
"	" Aug.	20, '59,	of	60,000	193 "	949.18
						$24,152.45

187 No. 7.

Page 368. COMPTROLLER'S OFFICE, *April*, 1860.

3 Cash acc., "2 % sinking fund," to sundries.
322 Houston & Texas Central Railway Co.:
Am't of 2 % sinking fund paid in by S. M. Swenson Ap'l 12, '60, on loan of Ap'l 13, '57, for $150,000, as per warrant No. 123..... 3,000.00

Page 377. COMPTROLLER'S OFFICE, *June*, 1860.

3 Cash acc., "2 % sinking fund," to sundries.
322 Houston & Texas Central Railway Co.:
Am't paid in by S. M. Swenson June 12, '60, as per warrant No. 172½, on loan of May 31, '58, for $60,000.00 ..... 1,200.00
Am't paid in by A. Groesbeck, June 18, '60, as per warrant No. 186 on loan of June 15, '60, for $30,000.00 ..... 600.00

Page 382. COMPTROLLER'S OFFICE, *July*, 1860.

3 Cash acc., "2 % sinking fund," to sundries.
322 Houston & Texas Central Railway Co.:
Am't paid in by John Bremond on loan of July 6, '58, for $30,000, as per warrant No. 242, dated July 10, '60 ..... 600.00

Page 414. COMPTROLLER'S OFFICE, *August*, 1860.

3 Cash, "2 % sinking fund."
322 To Houston & Texas Central Railway Co.:
Am't paid in by John Bremond on loans of July 22, '59, August 2, '59, and August 20, '59, for $30,000.00 each and deposited August 31, '60, as per warrant No. 328 ..... 1,800.00

188 Journal B. No. 8.

Page 105. COMPTROLLER'S OFFICE, AUSTIN, *January*, 1864.

506 C. H. Randolph, school fund, Dr. to—
322 Houston & Texas Central Rl. Rd. Comp.:
For amount in State treasury warrant paid by said company on acc. of interest on their bonds, as per deposit warrant No. 905 ..... 23,466.76 23,466.76

Page 109. COMPTROLLER'S OFFICE, AUSTIN, *March*, 1864.

506 30. C. H. Randolph, school fund, Dr. to—
Houston & Texas Central Rl. Rd. Comp.:
322 For amount in State money paid into treasury on acc. of interest on railroad bonds as per D. W. No. 907.. 6,670.00 6,670.00

Page 110. COMPTROLLER'S OFFICE, AUSTIN, *April*, 1864.

506 C. H. Randolph, school fund acc., Dr. to—
Houston & Texas Central Rl. Rd. Co.:
322 19. For am't paid in State warrants on acc. interest on r'lr'd bonds as per D. W. No. 908 ..... 15,009.92
322 19. For am't paid in State warrants on acc. interest on r'lr'd bonds as per D. W. No. 909 ..... 4,000.00
19,009.92

Page 136. COMPTROLLER'S OFFICE, AUSTIN, *July*, 1864.

508 C. H. Randolph, school fund, Dr. to sundries:
For the following funds paid on acc. of interest on r'lr'd bonds in July:

189

		No. D. W.	State w'ts fundable 8% b.	State w'ts fundable 6% b.	Total.
322	13. Houston & Texas Central Railroad Co.....	915	31,618.69	42.00	31,660.69

Page 147. COMPTROLLER'S OFFICE, AUSTIN, ——, 1864.

508 C. H. Randolph, school fund, Dr. to sundries.
For the following funds deposited to credit of school fund during the qr. ending 31st inst.:

		No. D. W.	State treas'y warr'ts fundable in— 8 % bonds.	6 % bonds.	Total.
322	20. Houston & Tex. Central Rl. Rd. for int. on bonds.....	918	2,000.00	....	2,000.00
322	24. Houston & Tex. Central Rl. Rd. for int. on bonds.....	922	22,569.98	397.00	22,966.98

Page 167. COMPTROLLER'S OFFICE, AUSTIN, *Dec'r*, 1864.

363 Sundries Dr. to interest on railroad bonds.
For interest at 6 % on bonds from date of same to March 1, '64:
322 Houston & Texas Central railroad..... 153,575.56

No. 9.

Page 173. COMPTROLLER'S OFFICE, ——, *March*, 1865.

363 1. Sundries Dr. to interest on railroad bonds:
322 Houston & Texas Central Rl. Rd. for int. at 6 % on $432,000 from March 1, '64, to March 1, '65. 25,920.00

Page 198. COMPTROLLER'S OFFICE, AUSTIN, *April*, 1866.

363 Sundries Dr. to interest on r'lr'd bonds.

190

322 Houston & Texas Central railroad for 6 % interest on $432,000 for 1 year to Mar. 1st, 1866..... 25,920.00

Page 199. COMPTROLLER'S OFFICE, AUSTIN, *May*, 1866.

568 Balance to Ledger C Dr. to sundries.
For balance at debit of the following accounts respectively transferred to Ledger C, viz:

322 Houston & Texas Central railroad:
Bal. principal Mar. 1st, 1866.. ..... 432,000.00
Bal. interest Mar. 1st, 1866..... 49,840.00
481,840

Journal "C." No. 10.

Page 54. COMPTROLLER'S OFFICE, ——, *October*, 1866.

508 Sundries Dr. to balances from Led. B.

57. Houston & Texas Central railroad:
For bal. principal due on bonds Mar. 1, '66, transferred from Led. B..... 432,000.00
For bal. interest due on bonds Mar. 1, '66, transferred from Led. B..... 49,840.00
481,840.00

Page 59. COMPTROLLER'S OFFICE, AUSTIN, *December*, 1866.

13. M. H. Royston, school fund, in specie and currency, Dr. to sundries.
For amount deposited in State treasury to credit of "school fund acc." during the month ending December 31st, 1866, viz:

191

		No. of D. W.	Specie.	Total
57	14. Houston & Texas Central Railroad Company.....	5	2,855.00	2,855.00

Page 61. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *January*, 1867.

13 M. H. Royston, "school fund," in specie and currency, Dr. to sundries.
For amount deposited in State treasury to credit of school fund acc. during the month ending January 31, '67, viz:

		No. of D. W.	Specie.	Total.
57	1. Houston & Texas Central R. road..	8	3,375.00	3,375.00

Page 82. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *March*, 1867.

533 Sundries Dr. to "interest on railroad bonds."

57 Houston & Texas Central railroad:
For interest on $432,000.00 at 6 % for 1 year to March 1st, 1867..... 25,920.00

Page 97. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *April*, 1867.

13 M. H. Royston, school fund, in specie and U. S. currency, Dr. to sundries.

57 23. Houston & Texas Central R. road:
For interest on bonds to March 1, '67, in specie, D. W. No. 14..... 10,830.00

192 No. 11.

Page 98. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *May*, 1867.

13 M. H. Royston, "school fund," Dr. to sundries.
For specie deposited to cr. school fund, viz:
57 4. Houston & Texas Central R. road:
For int. on bonds to Mar. 1, '67, per
D. W. No. 15..... .... 10,500.00
57 24. Houston & Texas Central R. road:
For int. on bonds to Mar. 1, '67, per
D. W. No. 16.... .... 4,500.00
15,000.00

Page 149. COMPTROLLER'S OFFICE,
AUSTIN, TEXAS, *December*, 1867.

39 John T. Allen, Tr., school fund, in specie and currency, Dr. to sundries.
57 Houston & Texas Central Railroad Co.:
For part interest due on bond prior to March 1st,
1866, in specie, per D. W. No. 22..... .... 6,230.00

Page 188. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *July*, 1868.

533 Sundries Dr. to interest on r'lr'd bonds.
57 The Houston & Texas Central railroad:
For 6 % interest on $432,000.00 for 1 year to March
1st, 1868.... .... 25,920.00

193

Page 241. COMPTROLLER'S OFFICE,
AUSTIN, TEXAS, *February*, 1869.

533 Sundries Dr. to interest on r'lr'd bonds.
57 Houston & Texas Central railroad:
For 6% interest on $432,000.00 for 1 year to Mar.
1st, 1869..... ..... 25,920.00

Page 302. COMPTROLLER'S OFFICE,
AUSTIN TEXAS, *March*, 1870.

533 Sundries Dr. to interest on railroad bonds.
57 Houston & Texas Central railroad:
For 6% interest on $432,000.00 for 1 year to Mar.
1st, 1870..... ... . 25,920.00

COMPTROLLER'S OFFICE, AUSTIN, TEXAS.

I, R. W. Finley, comptroller of public accounts of the State of Texas, do hereby certify that the eleven foregoing sheets are true copies of the accounts of and entries concerning the Houston & Texas Central Railroad Company, as appears on the books of this department up to May first, 1870, inclusive. Sheets No. 1 and No. 2 are true copies of the account of said railroad company appearing on Ledger "A" and Ledger "C;" the remaining sheets are true copies of the journal entries on pages and dates named thereon. Sheets

No. 3, 4, 5, 6, and 7 show entries appearing on Journal "A," sheets No. 8 and 9 on Journal "B," and sheets 10 and 11 on Journal "C."

194 Witness my hand and official seal this the 18th day of February, A. D. 1895.

[L. S.] R. W. FINLEY,
Comptroller of Public Accounts of the State of Texas.

COMPTROLLER'S OFFICE, AUSTIN, TEXAS.

I, J. R. Curl, acting comptroller of public accounts of the State of Texas, do hereby certify that the foregoing eleven sheets are true copies of the accounts of and entries concerning the Houston & Texas Central Railroad Company, as appears on the books of this department up to May 1, 1870, inclusive. Sheets No. 1 and No. 2 are true copies of the account of said railroad company appearing on Ledger "A" and Ledger "C;" the remaining sheets are true copies of the journal entries on pages and dates named thereon. Sheets Nos. 3, 4, 5, 6, and 7 show entries appearing on Journal "A," sheets No. 8 and 9 on Journal "B," and sheets No. 10 and 11 on Journal "C."

Witness my hand and official seal this the 16th day of January, A. D. 1896.

[SEAL.] J. R. CURL,
Act'g Comptroller of Public Accounts.

III.

The defendant next introduced in evidence a duly authenticated transcript from the books of the comptroller's office showing account of Washington County Railroad Company respecting the loan described in the plaintiff's petition to the Washington County Railroad Company, as said account stood on the books in the com-troller's department on the first day of May, 1870, as follows, to wit:

324. Dr. Washington County railroad.

Date of loan.			Principal.	Interest.
1859.				
June 6	To journal	324	66,000.00	
" "	" "	"		
Dec. 31	" interest	167		18,445.85
			66,000.00	18,445.85
Dec. 31	To balance		64,680.00	
1865.				
Mar. 1	" interest	173		3,880.80
1866.				
Apr'l —	" "	198		2,221.02
May 31	" "	199		322.88
			64,680.00	6,424.70

Washington County railroad. Cr.

Date of pay't.			Principal.	Interest.
1860.				
Feb. 28	By D. W. No. 85	348		2,899.45
June 6	" " 180	377	1,320.00	
1864.				
July 11	" " 914	136		12,755.41
Aug. 25	" " 923	147		2,790.99
Dec. 31	" balance		64,680.00	
			66,000.00	18,445.85
1865.				
May 11	By D. W. No. 928	182		3,880.80
" "	" " 929	"	27,663.00	
1866.				
May 31	Bal. to Led. C.		37,017.00	2,543.90
			64,680.00	6,424.70

4938

59. LEDGER C.

DR. Washington County railroad.

			Principal.	Interest.
1866.				
Oct. 31	To bal. from Led. B.	54	37,017.00	2,221.02
1867.				
March 1	" " "	82	.....	322.88
" "	" int. on R. R. bonds....	"	.....	2,221.02
1868.				
July 31	" " " " ...	188	.....	2,221.02
1869.				
March 1	" " " "	241	.....	2,221.02
1870.				
March 1	" " " "	302	.....	2,221.02

LEDGER C.

Washington County railroad. CR.

			Principal.	Interest.
1867.				
January 1	By D. W. No. 7.....	61	.....	317.98

197

Page 324. COMPTROLLER'S OFFICE, *August*, 1859.

347 Sundries to C. H. Randolph, treasurer, "school fund, in specie."
"Washington County Railwa- Co.:"
Am't of specie loaned said company from this fund on their bond for $66,000, June 6, '59..... $2,000.00
Sundries to C. H. Randolph, treasurer," school fund, in bonds."
Washington County Railway Co.:
Am't of U. S. bonds loaned said company on their bond for $66,000, dated May 23, '59..... 64,000.00

Page 348. COMPTROLLER'S OFFICE, *February*, 1860.

5 Cash ac., "school fund, in specie," to sundries.
324 Washington County Railway Co.:
Am't of interest paid in by S. M. Swenson on ac. of said company Feb. 28, '60, as per warrant No. 85 on loan of $66,000, made June 6, '59, to March 1, '60, 268 days..... 2,899.45

Page 377. COMPTROLLER'S OFFICE, *June*, 1860.

Cash ac., "2 % sinking fund to sundries."
Washington County Railway Co.:
Am't paid in by I. P. Key, June 15, '60, as per warrant No. 180 on loan of June 6, '59, for $66,000. ..... 1,320.00

198

Page 136. COMPTROLLER'S OFFICE, AUSTIN, *July*, 1864.

508 C. H. Randolph, school fund, Dr. to sundries.
For the following funds paid on ac. of interest on r'lr'd bonds in July:

# D. W.	State wts. fund. 8 % b.	St. wts. fd. 6 % b.	Total.
914	11,563	1,192.00	12,755.41

324 11. Washington County Railroad Company.

Page 147. COMPTROLLER'S OFFICE, AUSTIN, *August*, 1864.

508 C. H. Randolph, school fund, Dr. to sundries.
For the fol'g funds deposited to credit of school fund during qr. ending 31st inst.:

No. D. W.	State treas'y warra'ts fundable— In 8 % bonds.	In 6 % bonds.	Total.
923	1,140.99	1,650.00	2,790.99

324 25. Washington County Rl. Rd.

Page 167. COMPTROLLER'S OFFICE, AUSTIN, *Dec'r*, 1864.

363 Sundries Dr. to interest on R. R. bonds.
For interest at 6 % on bonds from date of same to March 1st, 1864:
324 Washington County railroad..... .. 18,445.85

Page 173. COMPTROLLER'S OFFICE, AUSTIN, *March*, 1865.

363 Sundries Dr. to interest on R. R. bonds.
324 Washington County R. Rd.:
For interest at 6 % on 64,680 from Mar. 1, '64, to Mar. 1, '65..... 3,880.80
199

Page 198. COMPTROLLER'S OFFICE, AUSTIN, *April*, 1866.

363 Sundries Dr. to interest on R. R. bonds.
324 Washington County Rl. Rd.:
For 6 % int. on $37,017.00 for 1 year to March 1st, 1866..... 2,221.02

Page 199. COMPTROLLER'S OFFICE, AUSTIN, *May*, 1866.

324 Washington County Rl. Rd. Dr. to interest on railroad bonds:
363 For interest on $27,663.00 from March 1st, 1865, to May 11th, 1865..... 322.88 322.88

Page 182. COMPTROLLER'S OFFICE, AUSTIN, *May*, 1865.

508 C. H. Randolph, school fund, Dr. to Washington County railroad:

		(S. wts. funl. 8 %.)	Total.
324	For am't deposited May 11th, '65, to pay int. on bonds to Mar. 1, '65, as per D. W. # 928.....	3,880.80	3,880.80
	For am't deposited May 11, '65, to pay on ac. of principal of bonds in the following funds, viz:		
	No. D. W. S. warrants, 6 %.		
	On ac. of principal... 929 25,298.20	2,364.80	27,663.00
	25,298.20	6,245.00	31,543.80

200

Page 61. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *Jan'y*, 1867.

13 M. H. Royston, "school fund," in specie & currency, Dr. to sundries:
For am't deposited in State treasury to credit of "school fund" ac. during the month ending Jan'y 31st, 1867, viz:

No. of D. W.	Specie.	U. States non-int. cor'y.	Total.
7	317.98	.....	317.98

59 1. Washington County Railroad Company.

Page 82. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *March*, 1867.

533 Sundries Dr. to "interest on R. R. bonds."
59 Washington County railroad:
For int. on $37,017.00 at 6 % for 1 yr. to March 1st, 1867..... 2,221.02

59 Washington County railroad Dr. to balances from Ledger "B:"

508 For int. from March 1st to May 11th, 1865, on $27,663.00, transferred to Ledger "C"..... ... 322.88

Page 188. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *July*, 1868.

533 Sundries Dr. to interest on R. R. bonds.
59 Washington County railroad:
For 6 % on $37,017.00.... ..... 2,221.02

201

Page 241. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *Febr'y*, 1869.

533 Sundries Dr. to int. on R. R. bonds.
59 Washington County railroad:
For 6 % int. on 37,017.00.... ..... 2,221.02

Page 302. COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *March*, 1870.

533 Sundries Dr. to interest on railroad bonds.
59 Washington County railroad:
For 6 % int. on $37,017 for 1 year to March 1st, 1870..... ... . 2,221.02

COMPTROLLER'S OFFICE, AUSTIN, TEXAS.

I, R. W. Finley, comptroller of public accounts of the State of Texas, do hereby certify that the four foregoing sheets, numbered 1, 2, 3, & 4, are true copies of the accounts of entries concerning the Washington County railroad up to May 1st, 1870, as appears on books of this department, sheet number 1 being true copies of the accounts of said railroad Co. appearing on Ledger- "A" and "C." Sheets numbers 2, 3, & 4 are true copies of the journal entries appearing on Journals "A," "B," and "C" on dates and pages named thereon.

Witness my hand and official seal this the 13th day of Feb'y, A. D. 1895.

[SEAL.] (Signed) R. W. FINLEY,
Comptroller of Public Accounts of the State of Texas.

202 COMPTROLLER'S OFFICE, AUSTIN, TEXAS.

I, Jas. R. Curl, acting comptroller of public accounts of the State of Texas, do hereby certify that the four foregoing sheets, numbered 1, 2, 3, & 4, are true copies of the accounts of and entries concerning the Washington County railroad up to and including May 1st, 1870, as appears on the books of this department, sheet number 1 being true copies of the account of said railroad Co. appearing on Ledgers "A" and "C." Sheets numbered 2, 3, & 4 are true copies of the journal entries appearing on Journals "A," "B," and "C" on dates and pages named thereon.

Witness my hand and official seal this 16th day of January, A. D. 1896.

(Signed) J. R. CURL,
[SEAL.] *Acting Comptroller of Public Accounts of the State of Tex.*

The defendant next introduced in evidence the following certificate by the comptroller of public accounts of the State of Texas under his seal of office:

I, R. W. Finley, comptroller of public accounts of the State of Texas, do hereby certify that the following payments were made by or for the Houston & Texas Central Railway Company on account of school fund loan on dates set opposite each amount since May 1st, 1870, as shown by the records of this office:

203

Date.	Deposit.	Principal.	Interest.
Oct. 26, 1870	Deposited	6,573.24	19,719.73
May 1, 1871	"	6,507.51	19,522.53
Nov. 3, "	"	6,442.43	19,327.28
May 7, 1872	"	6,378.01	19,134.03
Nov. 9, "	"	6,314.23	18,942.68
May 8, 1873	"	6,251.09	18,753.27
Nov. 7, "	"	6,188.58	18,565.24
May 1874	"	6,126.69	18,380.07
Nov. "	"	6,065.42	18,196.28
May 1875	"	6,004.77	18,014.31
Nov. "	"	5,944.72	17,834.17
May 1876	"	5,885.27	17,655.82
Nov. "	"	5,826.42	17,479.27
May 1877	"	5,768.15	17,304.47
Nov. "	"	5,710.48	17,131.43
May 1878	"	5,653.37	16,960.12
Nov. "	"	5,596.84	16,790.52
May 1879	"	5,540.87	16,622.61
Nov. "	"	5,485.46	16,456.38
May 1880	"	5,430.60	16,291.82
Nov. 9, "	"	5,376.30	16,128.90
May 9, 1881	"	5,322.53	15,967.61
Nov. 10, "	"	5,269.31	15,807.94
May 8, 1882	"	5,216.62	15,649.86
Nov. 9, "	"	5,164.45	15,490.36
May 9, 1883	"	5,112.80	15,338.43
Nov. 8, "	"	5,061.68	15,185.04
May 9, 1884	"	5,011.07	15,033.22
Nov. 9, "	"	4,960.95	14,882.86

204

Date.	Deposit.	Principal.	Interest.
May 8, 1885	Deposited.....	4,911.34	14,734.03
Nov. 9, "	"	4,862.23	14,586.69
May 7, 1886	"	4,813.61	14,440.82
Nov. 9, "	"	4,765.47	14,296.42
May 9, 1887	"	4,717.82	14,153.45
Nov. 8, "	"	4,670.64	14,011.92
May 8, 1888	"	4,623.93	13,871.80
Nov. 9, "	"	4,577.69	13,733.04
May 9, 1889	"	4,531.92	13,598.45
Nov. 8, "	"	4,486.59	13,457.09
May 9, 1890	"	4,441.72	13,325.20
Nov. 8, "	"	4,397.31	13,191.94
May 8, 1891	"	4,353.34	13,060.02
Nov. 9, "	"	4,309.81	12,929.42
May 9, 1892	"	4,266.71	12,800.13
Nov. 7, "	"	4,224.04	12,672.13
May 8, 1893	"	4,181.80	12,545.40
Nov. 9, "	"	2,062.68	

In witness whereof I hereunto set my hand and official seal the 20th day of May, 1895.

[SEAL.] (Signed) R. W. FINLEY,
Comptroller.

V.

The defendant next introduced in evidence the following certificate by the comptroller of public accounts of the State of Texas under his seal of office:

I, R. W. Finley, comptroller of public accounts of the State of Texas, do hereby certify that the following payments were
205 made by or for the Washington County R. R. Co. on account of school fund loan on date set opposite each amount since May 1, 1870, as shown by the records of this office:

Date.	Deposited.	Principal.	Interest.
Oct. 6, 1870	Deposited.....	1,035.63	3,106.90
May 1871	"	1,030.88	3,092.34
Nov. 3, 1871	"	1,017.73	3,053.20
May 7, 1872	"	1,007.55	3,022.67
Nov. 9, "	"	997.48	2,994.45
May 8, 1873	"	987.50	2,962.52
Nov. 7, "	"	977.63	2,932.90
May 7, 1874	"	967.85	2,903.56
Nov. 6, "	"	958.18	2,874.53
May 7, 1875	"	948.59	2,845.79
Nov. 9, "	"	939.10	2,817.33
May 5, 1876	"	929.71	2,789.16
Nov. 6, "	"	920.42	2,761.27
May 10, 1877	"	911.21	2,733.65
Nov. 10, "	"	902.00	2,706.31
May 10, 1878	"	893.08	2,679.25
Nov. 9, "	"	884.15	2,652.46
May 1, 1879	"	875.31	2,625.93

In witness whereof I hereunto set my hand and official seal this the 20th day of May, 1895.

[SEAL.] (Signed) R. W. FINLEY,
Comptroller.

VI.

206 The defendant next introduced in evidence a copy, certified to by the comptroller of public accounts of the State of Texas under his official seal, of a written protest filed by him upon the date of each of the payments subsequent to the first day of May, 1870, shown by above certificates, each and all of said protests being substantially as follows, differing only in date of filing by the comptroller and the amount of payment referred to:

AUSTIN, *November 1st*, 1871.

To the Hon. A. Bledsoe, comptroller of the State of Texas.

SIR: On the 26th of October, 1870, the Houston & Texas Central Railway Company filed a protest against your action in refusing to allow the credit of $152,864.55 claimed by the company on the loan of the special school fund of the State to said company and to the Washington County Railroad Company; that the credit so claimed was entered on the books of your office and was allowed by special act of the legislature of the 15th of August, 1870, and previous legislative acts. The company has again demanded that said credit, and also the excess of interest thereon paid by the company, should be allowed, which you have refused, and the governor threatens to ad-

vertise and sell the said railways unless the full sum of interest and sinking fund claimed by you to be due on the first of November, 1871, to wit $29,840.54 in gold, be paid by the company. The company deems that the action of the governor and yourself *are* illegal and wrongful; but, having no adequate remedy to prevent damage resulting to their credit and property and to the interests of the public and the prosecution of their work, they are compelled to submit to the illegal demands so made. The company therefore again protests against your action and prays the sum demanded into the treasury under protest, as it has heretofore done, and it will claim a readjustment and repayment of the excess of interest now paid and all payments hereafter made without allow-
207 ance of said credit on said account. You will oblige me by acknowledging the receipt of this protest.

Respectfully,

For the H. & T. C. R'Y CO.,
By F. A. RICE, *Treasurer.*

Filed in comptroller's office Nov. 1, 1871.

Plaintiff's Evidence in Rebuttal.

1.

Plaintiff's counsel introduced evidence sufficient to establish the fact that the governor had given authority to the attorney general to institute this suit.

2.

It was agreed by both parties that the Washington County Railroad Company was merged into the Houston & Texas Central Railway Company in 1870 and was operated by the latter company until its property and affairs passed into the hands of receivers, in February, 1885, and it was operated by such receivers until April 10th, 1893, and passed with the other lines of the Houston & Texas Central Railway Company to Frederick P. Olcott by the foreclosure sale in 1888 and from Olcott to this defendant, organized under the articles of incorporation filed August first, 1889, and hereinbefore set forth.

It was proven that the Washington County Railroad Co. had no offices nor officers upon whom service could be had nor had actual existence as a corporation.

3.

Plaintiff next introduced F. R. Lubbock, who testified substantially and in effect:

208 That he was governor of Texas one term, from November, 1861, to November, 1863; that he left Texas in the spring of 1864 and went into the army in Louisiana, and thence to Richmond; that he knew the market cash value of the treasury warrants of Texas in 1862 and during the remainder of the war; that the market price of such treasury warrants issued during the war varied

at different times. They commenced depreciating, and in 1863 and 1864 there was little value attached to them; that while governor he was accustomed to sell warrants issued to him for his salary from time to time, and upon his retirement from office of governor, in November, 1863, he sold the warrants issued to him for his salary to Mr. Defoe, a druggist in Austin, for 10 cents on the dollar. He added: I suppose that was the market value of the warrants, as I got all in cash I could for them.

On quitting the governor's office he was assigned to military duty and cleaned up everything and went off.

(The evidence of said witness respecting the cash market value of such warrants and the sale of his own warrants was admitted over the objections of counsel for defendant, as shown by bill of exceptions No. 3.)

Witness further testified that there was a class of warrants issued during the war that were recognized by the State after the war. They were, as the witness remembers, issued during the war for defense of the frontier against the Indians, etc., before the war.

The State warrants issued generally for civil services and things of that kind during the war were not recognized. If any of them were ever paid, I did not know it. None them were paid while I was treasurer.

The plaintiff next introduced in evidence one of the bonds executed by the Houston & Texas Central Railway Company,
209 described and referred to in the plaintiff's petition as follows, to wit:

Houston and Texas Central Railway Company.

Bond.

Whereas the Houston and Texas Central Railway Company has applied to the board of school commissioners of the State of Texas, which board consists of the governor, comptroller, and attorney general of said State, for a loan, under the provisions of an act to provide for the investment of the special school fund in the bonds of railroad companies incorporated by the State, passed August 13, 1856, and "An act to amend the fourth section of an act for the investment of the special school fund," and has represented to said commissioners that the said company has completed in a good and substantial manner and furnished ready for actual use a continuous section of sixty miles of its road, commencing at the city of Houston and running thence to the interior, and that the said company has also graded an additional consecutive section of five miles of its said road ready for the cross-ties and other superstructures, commencing at the upper end of said sixty miles;

And whereas the said board of school commissioners have appointed a competent engineer, who have examined the road of said company and has made a full report upon the condition thereof under oath, and has also reported all matters pertaining to the business

of said company which he deemed useful to said commissioners in ascertaining the true condition of said road and said company; and whereas the said company has produced to said commissioners certificates from the clerks of the county courts of Austin and Grimes counties and an affidavit, made by the president of said company, showing that the road of said company is not subject to any lien whatever taking precedence of that to the State of Texas, and that the liens on said road are as follows: On the first fifty miles, first to the State of Texas for six thousand dollars per mile, and, second, a mortgage on the first twenty-five miles of said
210 road, subject to that of the State and made in favor of A. C. Flagg and C. E. Habicht, trustees, for the sum of one hundred and twenty-five thousand dollars, the said board of commissioners being fully satisfied that the said five miles of said road *has* been constructed and completed, and that said five miles *has* been graded as hereinbefore stated and in accordance with the provisions of the acts aforesaid, and that the last five miles of said road are not subject to any liens whatever other than the lien to be created by this obligation; they, the said board of commissioners, have drawn a warrant on the treasury of said State of Texas in favor of said company against the special school fund for the sum of $30,000, to be paid in the five (5) per cent. bonds of the United States belonging to said fund at their current value, including premium, should the same be above par value, but if not, then at par value:

Now, therefore, for and in consideration of the premises and of the sum of one dollar to the said company paid by the said commissioners, the said company hereby acknowledges itself to be justly indebted to the State of Texas in the sum of thirty thousand dollars, which amount the said company promises to pay to the State aforesaid, at the office of the treasurer thereof, in the city of Austin, ten years from the date hereof, with interest thereon at the rate of six per centum per annum, to be paid at the office of said treasurer on the first day of March in each year, for which annual payments of interest coupon bonds are hereto attached, and said company also promises to pay the said State, at the office of said treasurer, at the expiration of each year from the date hereof, two per cent. upon the said sum of thirty thousand dollars for the purpose of establishing a sinking fund to be applied towards the payment of said debt of thirty thousand dollars at its maturity, and the said company hereby assents and agrees that this bond and the coupon interest bonds hereto attached shall constitute a lien upon the road and chartered rights of their company,
211 including the road-bed, right of way, grading, bridges, iron rails, equipment and masonry, and upon all the stock subscribed for in said company, all the depots and depot stations, and all the property owned by said company as necessary for its business; that said lien shall have priority over all other claims against said company, and that the State of Texas, upon the execution of this bond and the coupon interest bonds hereto attached, and by virtue of the same, shall be invested with said lien or mortgage for the payment of said bonds and the interest thereon as the same becomes

due without the necessity of any deed, especial contract, or act of registration, and that the said State shall be invested with all other rights and privileges which are provided for in the two acts hereinbefore referred to and named, which said acts are made a part of this bond and the interest bonds hereto attached.

In testimony whereof the said company *has* caused their corporate seal to be hereto affixed, with the signature of their president, and have also caused the same to be countersigned by their secretary this fourteenth day of May, eighteen hundred and fifty-nine.

A. GROESBEEK, *Pres't.*

WM. RICE,
[SEAL.] By F. A. RICE, *Att'y.*

Attest: W. R. BAKER, *Sec'y.*

STATE OF TEXAS, }
Harris County. }

Before me, A. C. Davis, a notary public in and for the county of Harris, duly commissioned and qualified, this day came and personally appeared Abraham Groesbeek, president, and William R. Baker, secretary, of the Houston and Texas Railway Company, to me well known, and each for himself acknowledged that he has executed the foregoing bond in his official capacity for the purposes and considerations therein set forth.

212 Witness my hand and notarial seal, at office, in Houston, this fourteenth day of May, A. D. 1859.

A. C. DAVIS,
[SEAL.] *Not. Pub., H. C.*

THE STATE OF TEXAS, }
County of Grimes, }

Filed for record at 7½ o'clock a. m. on the 26th day of May, A. D. 1859, and recorded at 12 o'clock m. on the same day in Book A of said county mortgage records, on pages 99, 100, 101, and 102; to all of which I certify under my hand and seal of office, at office, in Anderson, this the 26th day of May, A. D. 1859.

G. M. MOONING,
[SEAL.] *Clerk County Court of said County.*

No. 11.

The Houston and Texas Central Railway Company promises to pay the State of Texas the sum of — dollars at the office of the treasurer of said State, in the city of Austin, on the — day of ——, A. D. 1869, being the interest on the annexed bond from the first day of March, 1889, to the — day of ——, A. D. 1869.

In testimony whereof the said company have caused their corporate seal to be hereto affixed and signed by their president, and have also caused the same to be countersigned by their secretary this 14th day of May, A. D. 1859.

A. GROESBEEK, *President.*

W. R. BAKER, *Secretary.*

No. 10.

The Houston and Texas Central Railway Company promise to pay to the State of Texas the sum of eighteen hundred dollars at the office of the treasurer of said State, in the city of Austin, on the first day of March, A. D. 1869, being the interest on the an-
213 nexed bond from the first day of March, 1868, to the first day of March, 1869.

In testimony whereof the said company have caused their corporate seal to be affixed and signed by their president, and have also caused the same to be countersigned by their secretary this 14th day of May, 1859.

A. GROESBEEK, *President.*

W. R. BAKER, *Secretary.*

Endorsed as follows: Filed for record at 6 o'clock p. m., May 16, A. D. 1859. Geo. W. Johnson, C. C., A. C. Z. W. Matthews, d'y.

Recorded at 9 o'clock a. m., May 21, A. D. 1859, in Book H of Deeds of Austin County Records, pages 292, 293, and 294, No. 106; all of which I certify, signing my name and affixing the impress of seal of county court of said county, at office, in the town of Bellville, this 21st day of May, A. D. 1859.

GEO. W. JOHNSON, *C. C. C., A. C.*
Z. W. MATTHEWS, *D'y.* [SEAL.]

Filed June 11, 1859, at 7 o'clock p. m., and recorded in Harris county record of deeds, Book V, pages 408, '9, '10.

Witness my hand and seal at Harris county court.

J. B. DART, *Clerk, H. C.,*
By J. BRASHEAR, *Dep'y.* [SEAL.]

Endorsed on face of bond: Edward Clark, governor of the State of Texas.

Filed Feb. 10, 1896.

JAS. P. HART, *Clerk.*

Plaintiff next introduced in evidence the bond executed by the Washington County Railroad Company to the State of Texas and described in plaintiff's petition, which, omitting the coupons, is as follows, to wit:

Washington County Railroad Company.

$66,000. *Bond.* $66,000.

Whereas the Washington County Railroad Company has
214 applied to the board of school commissioners of the State of Texas, which board consists of the governor, comptroller, and attorney general of said State, for a loan under the provisions of "An act to provide for the investment of the special school fund in the bonds of the railroad companies incorporated by the State of Texas," passed August 13th, A. D. 1856, and the act "for the relief

of the Washington County Railroad Company," approved January 28th, 1858, and has represented to said commissioners that said company has completed in good and substantial manner and furnished for actual use a continuous section of eleven miles of its road, it being one entire half of its road from Hempstead to Brenham, the said continuous section of eleven miles commencing at Hempstead; and

Whereas the said board of school commissioners has appointed a competent engineer, who has examined the road of said company and made a full report upon the condition thereof under oath, and has also reported all matters pertaining to the business of said company which he deemed useful to said commissioners in ascertaining the true condition of said road and company;

And whereas the said company has produced to said commissioners certificates from the proper officers of the counties in which said road is situated, and an affidavit made by the president of said company showing that said road is not subject to any lien or incumbrance of any kind having priority over or coming in conflict with the lien or mortgage of the State;

And whereas said board of school commissioners, being fully satisfied that said continuous section of the eleven miles of said road has been constructed and completed in accordance with the provisions of the acts aforesaid, and that the said road and said section are not subject to any lien whatever in conflict with or otherwise affecting the lien or mortgage to be created by this obligation, they, the said board of school commissioners, have drawn a warrant on the
215 treasurer of said State of Texas in favor of said railroad company against the special school fund for the sum of sixty-six thousand dollars, to be paid in five per cent. bonds of the United States belonging to the said special school fund at their current value, including premium, should the same be above their par value; but if not, then at their par value:

Now, therefore, for and in consideration of the premises and of the sum of one dollar to said company paid by the said commissioners, the said company hereby acknowledges itself to be justly indebted to the State of Texas in the sum of sixty-six thousand dollars, which amount the said company promises to pay the said State, at the office of the treasurer thereof, in the city of Austin, ten years from the date hereof, with interest thereon at the rate of six per cent. per annum, to be paid at the office of the said treasurer on the first day of March in each year, for which annual payment of interest coupon bonds are hereto attached; and said company also promises to pay the said State, at the office of said treasurer, at the expiration of each year from the date of this loan, two per cent. upon said sum of sixty-six thousand dollars for the purpose of establishing a sinking fund to be applied towards the payment of said loan of sixty-six thousand dollars at its maturity, and the said company hereby assents that this bond and the coupon bonds hereto attached may and agrees that they shall constitute a lien upon the road and chartered rights of said company, including the roadbed, right of way, grading, bridges, iron rails, equipments, and

upon all the stock subscribed for in said company, all the depots, depot stations, and all the property owned by said company, as necessary for its business.

That said lien shall have priority over all other claims against said company, and that the State of Texas, upon the execution of this bond and the coupon bonds for interest hereto attached and by virtue of the same, shall be invested with said lien or mortgage for the payment of said bond and all sums thereby agreed to be
216 paid, and the interest thereon, as the same becomes due, without the necessity of any deed, special contract, or act of registration, and that the said State of Texas shall also be invested with all the other rights and privileges which are provided for in the provisions of the acts aforesaid, and the said acts are hereby referred to and made a part of this bond and the coupon interest bonds hereto attached.

In testimony whereof the said Washington County Railroad Company has caused its corporate seal to be hereto affixed and the same to be signed by its president and countersigned by its treasurer this 28th day of May, A. D. 1859.

(Signed) J. D. GIDDINGS, *Pres't.*
A. G. COMPTON, *Treas.*

Signed in the presence of—
JNO. S. YOUNG.
J. M. OWENS.

STATE OF TEXAS, }
County of Washington. }

Personally appeared before me, S. S. Hosea, clerk of the county court of said county, J. M. Owens and J. S. Young, subscribing witnesses to the foregoing bond, who, being duly sworn, saith that J. D. Giddings, president of said railroad company, and A. G. Compton, treasurer thereof, signed, sealed, and delivered the same in their presence for the purposes and considerations therein expressed, and that they signed their names as witnesses to the due execution thereof at the request of said signers.

Witness my hand and the seal of said county, at Brenham, this twenty-eighth day of May, eighteen fifty-nine.

[SEAL.] S. S. HOSEA, *C. C., W. C.,*
By G. B. HAINS, *Deputy.*

217 STATE OF TEXAS, }
County of Austin. }

Filed for record at 2 o'clock p. m. May 28th, A. D. 1859, and recorded same date at 6½ o'clock p. m., in Book H of Deeds of Austin County Records, pages 311, 312, and 313, No. 210; to certify all which I hereunto sign my name and affix the impress of the seal of the county court of said county, at office, in the town of Belleville, this the 28th day of May, A. D. 1859.

[SEAL.] GEORGE W. JOHNSON,
C. C. C., A. C.,
By Z. W. MATTHEWS, *Deputy.*

THE STATE OF TEXAS, }
Washington County. }

I, S. S. Hosea, clerk of the county court of Washington county and State of Texas, do hereby certify that the above and foregoing bond was filed for record in my office at 9 o'clock a. m. and recorded on same day at 11 o'clock a. m. in Book Q of Deeds, Mortgages, etc., of Washington County Records, pages 662 and 663, No. 604.

Attest S. S. Hosea, clerk, and the seal of the county court of Washington county and State of Texas, at office, in the town of Brenham, in said county, this the 30th day of May, A. D. 1859.

[SEAL.] S. S. HOSEA,
C. C. C., W. C.
G. W. HAINS, *Deputy.*

Endorsed (only) in the following words, to wit: Filed Feb. 10, 1896. Jas. P. Hart, clerk.

Plaintiff next introduced in evidence, over the objection of defendant, as shown by bill of exceptions # 4, the message of Gov. E. J. Davis, dated Aug. 6, 1870, to house of representatives of the twelfth legislature, vetoing the act entitled "An act for the
218 relief of the Houston & Texas Central Railway Company."

The defendant had offered a part thereof, as is shown by the portion of the house and senate journals read in evidence and above set forth.

The entire message is as follows:

Extracts from House Journal, Twelfth Legislature.

EXECUTIVE OFFICE, AUSTIN, *Aug.* 6, 1870.

Hon. Ira H. Evans, speaker of the house of representatives.

SIR: I feel it my duty to return to your house, where it originated, "An act for the relief of the Houston and Texas Central Railway Company," and ask that the same be reconsidered.

The constitution (article nine, section nine) provides that the legislature "shall, from time to time, as may be necessary, invest the principal of the school fund in the bonds of the United States Government and in no other security." The act under consideration entitled "An act for the relief of the Houston and Texas Central Railway Company" is in direct conflict with the constitutional provisions cited. It undertakes, after attempting to consolidate the Washington County Railroad Company with the Central, to make an investment of a portion of the school fund that had been loaned to the two companies named prior to the adoption of the present constitution in new bonds of the Central (which the preamble of the act says are "issued," while the body says "are issued or to be issued"), and to release $152,864.55 of the school money altogether. The whole amount that this company is indebted to the school fund (including this amount proposed to be released) was on March 1, 1870, $756,197.57.

It does not lie within the power of the legislature to invest or reinvest the school fund otherwise than as provided by the constitution. It cannot remit or grant any portion of that fund as is attempted in this act.

219 Section four of this act, under the guise of relieving from a forfeiture under an act of September 21, 1866, styled "An act granting lands to the Houston and Texas Central Railway Company," appears to be an ingenious device to evade section six of article ten of the constitution, and to continue to that company a grant of land which has been forfeited by its own failure to comply with the law, and which has been cut off by the constitution.

Section six of the act provides that "All laws or parts of laws now in force concerning this company, not in conflict with the foregoing provisions, shall not be affected by the passage of this act," a seemingly unnecessary and harmless provision, but one which must have been devised so as to declare by implication that "all laws and parts of laws in conflict with it are by it affected" or amended.

As section eighteen of article twelve of the constitution does not permit a law to be revised or amended by reference to its title, it is surely not competent for the legislature to "affect"—that is, revise or amend—laws and parts of laws by implication and without so much as making reference to their titles.

Time only remains to call your attention — two other constitutional objections to this act.

Section two of the act, by providing for the investment of the school fund in new bonds "issued or to be issued by virtue of a deed of trust executed by said company on the first day of July, A. D. 1866," makes the act a "retroactive law" and causes it to conflict with section fourteen of article one of the constitution.

This provision merits a most serious consideration not only on account of the constitutional point, but because it suggests inquiry as to the validity of a deed and bonds made (whether in behalf of one or both of the roads mentioned in the act) prior to any lawful authority on the part of either or both to make them.

Had section seventeen of article twelve of the constitution prescribed that every law enacted by the legislature "shall
220 embrace more than one object, and they shall not be expressed in the title," instead of the contrary, this act might, so far as its title is concerned, be held to have complied with its requirements; but not otherwise. If, instead of "An act for the relief of the Houston and Texas Central Railway Company," it had been styled "An act investing and donating portions of the school fund," "An act for the relief of the Washington County Railroad Company," or "An act to consolidate and confer new affirmative franchises to the railroad companies named," its title would carry a better idea of the chief of the various objects embraced in its scope, some of which (such as the right to branch) do not lie within the import of the vague word "relief." Considerations of public policy, some of which are obvious, might be urged against this act, but to present them would be superfluous.

Upon an examination of the statutes, abundant evidences will appear that perhaps no corporation chartered by this State has dealt more largely in promises and has been more slack in performance, has more frequently come forward in one mode or another for relief, and has caused greater cost, in the way of legislation for its own benefit, than the corporation that has obtained this act. The fact that such is its record should not operate in its favor, especially when it sets at naught the constitution and seeks to spoliate the school fund.

The act asserts in its preamble that the State may exchange its present lien for the seven per cent. bonds of the company "without in any manner endangering the school fund."

This statement is not the truth. The said seven per cent. bonds, the Houston & Texas Central railroad, are now worth in the money market about eighty-five to eighty-eight cents per dollar in currency. My correspondents in New York to whom I applied for information write as follows: "In looking around to find the market value today (15th July) I was offered eighty-five for $100,000;"
221 "were a large sum put on the market of these bonds under orders to sell promptly, I doubt whether they would bring even 85 flat." * * * "The agent's price for the bonds in New York is ninety and accrued interest, but I doubt very much whether any sales for money have been made for that price; at least I know that our firm have frequently bought and sold these bonds for years past, and always under the agent's price."

As the lien we now have on this railroad is worth dollar for dollar in gold and the amount can be realized at once, and as gold is now selling at upwards of 120 per cent. in currency, and as we can take this currency and buy these very bonds at eighty-five cents on the dollar, it can very easily be seen that the school fund is endangered to the amount of more than $250,000 currency by this exchange.

But, in addition, the act, as before stated, proposes to release $152,864.55. The company claims this under pretense that it was paid during the rebellion in conformity with laws then controlling. The fact is that all railroad companies indebted to the school fund were by an act passed January 11, 1862, relieved from the necessity of any payment of either interest or principal of the school fund till "six months after the termination" of the war. Acts were subsequently passed (December 16, 1863, and November 15, 1864) allowing the companies to pay interest and principal in Texas treasury warrants and bonds and coupons.

These acts were passed avowedly for the purpose of keeping up the credit of that sort of money and security issued by a government in hostility to the United States, and the recognition of payments made thereunder violates the spirit (if not the letter) both of the fourteenth amendment to the Constitution of the United States and section thirty-four, article twelve, of our own constitution. Further, the payments made by these companies were delayed till the class of currency paid in was scarcely worth as much as
222 waste paper. The only payments made by the Houston & Texas Central railroad were from January to August, 1864,

when this paper might possibly have averaged twenty-five or thirty for one dollar of gold, but no more, while the only payment made by the Washington County railroad was made in May, 1865 ($31,543.80), more than one month after the surrender of General Lee. These are the sort of payments which the act proposes to accept as equivalent to gold.

These two roads have since 1867 ceased altogether to make payments of either principal or interest due the school fund, not, however, from inability to pay, as the receipts of the Houston & Texas Central railroad alone since that year, beyond all current expenses, have been largely more than sufficient to pay off all the indebtedness of both roads.

While we are debating the propriety of a system of internal improvements to be aided by the State, the management of this Houston & Texas Central railroad in its relation to the State and its influence on legislation may well cause us to hesitate.

At every session of the legislature and conventions of the people for years past, this road has managed to procure some legislation to "relieve" it from the consequences of its own want of compliance with its promises entered into under previous acts of relief. The present act is a sweeping instance of the sort. Overflowing with wealth wrung by exorbitant charges from the people, forgetting the princely donation it has already received in lands, and emboldened by previous success, its managers now throw off the last scruples and seek to evade their solemn obligations in every respect, even grasping at the fund sacredly hoarded for the education of the children of the State.

So far this corporation has been successful in enforcing its demands, and it remains to be seen whether any limit can be placed thereon. If this comparatively weak corporation can thus control legislation and defy law, justice, and its own obligation, what may we expect from the great monopolies we are anxious to build up.

223 An exhibition of patriotic firmness on the part of the legislature, in resisting the project, will save the State from many ills.

Respectfully,

(Signed) EDMUND J. DAVIS, *Governor.*

THE STATE OF TEXAS, }
Department of State. }

I, Allison Mayfield, secretary of state of the State of Texas, do hereby certify that the within and foregoing is a true copy of the message of Edmund J. Davis, governor of Texas, to the legislature of Texas in relation to "An act for the relief of the Houston & Texas Central Railway Company," as contained in the House journal of the twelfth legislature, which convened in the city of Austin, April 26th, 1870, and adjourned August 15, 1870.

Witness my official signature and seal of State, affixed at the city of Austin, this the 22nd day of January, A. D. 1896.

(Signed) ALLISON MAYFIELD,
Secretary of State.

Copy.

Plaintiff next introduced, over the objection of defendant, as shown by bill of exception No. 11, a certificate of R. W. Finley, comptroller of public accounts of the State of Texas, dated the 27th day of January, 1896, under his seal of office, setting forth copies of certain entries therein specified as contained in the books of his department, showing charge of certain 8 % State bonds to the military board during the years 1862, 1863, and 1865, and other entries in reference to such bonds during said years, as follows, to wit:

224 COMPTROLLER'S OFFICE, AUSTIN, TEXAS.

I, R. W. Finley, comptroller of public accounts of the State of Texas, do hereby certify that the following is a true and correct copy of the entries therein named as they appear on the books of this department:

Journal "A," page 583, May —, 1862.

"Military boards to 8% State bonds."

"Bonds No. 3	1,000.00
"Bond No. 5 to No. 250, inclusive, 246, at $1,000 ea.	246,000.00
	247,000.00

"With interest coupons from Jan. 1, 1862, to be accounted for by military board."

Journal "B," page 62, June —, 1863.

"Military board, 50 8% State bonds."

"For amount delivered to military board (301) to June 30, '63	301,000.00 "

Journal "B," page 76, August —, 1863.

"Cancelled treasury warrants to 8% State bonds."

"For this amount cancelled and funded in 294 bonds."	294,291.53 "

Journal "B," page 184, May 31, 1865.

"Military board Dr. to 8% State bonds."

"For 30 8% State bonds, Nos. 871 to 900, inclusive, delivered to C. H. Randolph, as per receipt on register of bonds	30,000.00
"For 2 8% State bonds, Nos. 901 and 902, delivered to C. H. Randolph, per statement of W. S. Hotchkiss, accountant, but not receipted for on his register of bonds	2,000.00

225

"For 15 8% State bonds, Nos. 903 to 917, inclusive, delivered to N. B. Pierce and J. S. Holman, as per register of bonds..... .... 15,000.00

$47,000.00"

In witness whereof I hereunto set my hand and official seal this the 27th day of January, A. D. 1896.

(Signed) R. W. FINLEY,
[SEAL.] *Comptroller of Public Acc'ts.*

For the purpose of showing the amount of State warrants on hand belonging to the permanent school fund fundable in six per cent. and 8% bonds respectively, as well as the general condition of the school fund, plaintiff next introduced in evidence, over the objections of defendant, as shown by bill of exceptions No. 12, a statement or account headed "State of Texas school fund in account with C. H. Randolph, treasurer, for two months, ending on the 31st of December, 1864," certified to by R. W. Finley, comptroller of public accounts, under his seal of office, on the 18th day of January, 1896, and by W. B. Wortham, treasurer, under his seal of office, on the 7th day of February, 1896, as follows, to wit:

226 The State of Texas school fund in account with C. H. Randolph, treasurer, for two months, ending on the 31st December, 1864. 227

Dr.

To amount of cash disbursed upon special treasury warrants drawn upon county orders for school fund due counties, viz:			
In Confederate notes, new issue.....		1,150.78	
" " " old issue.....		1,798.94	
		2,949.72	2,949.72
To balance cash on hand Dec. 31st, 1864:			
In bonds of railroad companies.	1,780,980.00		
In 10% interest warrants....	11,239.71		
In specie for investment....	4,148.88		
		1,796,368.59	
In specie for distribution..	1,124.20		
In specie due upon " ..	677.80		
In specie, contingent fund....	977.00		
		2,779.00	
In treasury warrants, fundable in 8% bonds.....	281,567.33		
In treasury warrants, fundable in 6% bonds.....	7,256.00		
		288,823.33	
In Confederate notes, old issue, due upon distribution....	196,024.25		
In Confederate notes, old issue, for distribution.....	35,626.74		
		231,650.99	
			2,319,621.91

Cr.

By balance on hand, cash, Oct. 31st, 1864, viz:			
In bonds of railroad company	1,780,980.00		
10% interest warrants.....	11,239.71		
In specie, for investment.....	4,148.88		
		1,796,368.59	
In specie, for distribution....	1,124.20		
" due upon distribution.....	677.80		
" contingent fund....	977.00		
		2,779.00	
In treasury warrants, fundable 8% bonds.....	281,567.33		
In treasury warrants, fundable 6% bonds.....	7,256.00		
		288,823.33	
In Confed. notes, old issue, due on distribution.....	197,823.19		
In Confed. notes, old issue, for distribution	23,785.01		
		221,608.20	
			2,309,579.12
Received by transfer *by* in old issue Confed. notes:			
Amount transferred from revenue of State account, being a portion of one-tenth of the revenue received.....	8,630.46		
By amount transferred from State-revenue account by order of the comptroller....	2,311.27		
		11,841.73	

	In new issue Confederate notes:		
	By amount transferred from State-revenue balance of one-tenth of State revenue received	420.10	
	By amount transferred from State-revenue account by order of comptroller	730.68	
		1,150.78	
			12,992.51
2,322,571.63			2,322,571.63

228 TREASURER'S OFFICE,
AUSTIN, *Dec.* 31*st*, 1864.

C. H. Randolph, treasurer.

THE STATE OF TEXAS, }
County of Travis. }

I, R. W. Finley, comptroller of public accounts of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original instrument now on file in this department.

In witness whereof I hereunto set my hand and official seal this the 18th day of January, A. D. 1896.

[SEAL.] R. W. FINLEY,
Comptroller of Public Accounts.

TREASURY DEPARTMENT,
AUSTIN, TEXAS, *Feb'y 7th*, 1896.

I, W. B. Wortham, treasurer of the State of Texas, do hereby certify that the items set forth in the within statement are true and correct, as shown by the books of this office.

In witness whereof I hereunto set my hand and official seal the date above written.

[SEAL.] W. B. WORTHAM, *Treasurer.*

For same purpose plaintiff next introduced in evidence, over the objections of defendant, as shown by bill of exception # 13, a statement or account headed "The State of Texas school fund in account with C. H. Randolph, treasurer, for two months ending the 28th day of February, 1865," certified to by R. W. Finley, comptroller of public accounts, under his seal of office, on the 18th day of January, 1896, and by W. B. Wortham, treasurer, under
229 his seal of office, on the 7th day of Feb., 1896, as follows, to wit:

The State of Texas school fund in account with C. H. Randolph for two months ending on the 28th day of February, 1865.

DR.

To amount disbursed in payment of special treasury warrants drawn for school funds due counties upon 6,663.54, orders of county courts, new issue Confederate notes		6,663.54	
Exchange.			
To amount of Confederate notes, old issue, on hand in this fund on Dec. 31, 1864, delivered to P. Priestly, C. S. depository at Austin, by order of the comptroller; to be exchanged for notes of the new issue under the acts of the C. S. congress and of the State legislature relating thereto, viz., am't due counties upon distribution	196,024.25		
Am't for distribution to counties	35,626.74		
		231,650.99	
			238,314.53

To bal. due cash on hand Feb. 28, '65, viz:			
In bonds of railroad companies	1,780,980.00		
" 10 % interest warrants	11,239.71		
" specie for investment	4,148.88		
		1,796,368.59	
" " " distribution	1,124.20		
" " due for distribution	677.80		
" " contingent fund	977.00		
		2,779.00	
" treasury warrants, funl. in 8 % bonds.	281,567.33		
" " " " 6 % " .	7,256.00		
		288,823.33	
" Confederate notes, new issue, for distribution in 1865	4,509.04	4,509.04	
			2,092,479.96
			2,330,794.49
230	Cr.		
By balance on hand Dec. 31, '64, viz:			
In railroad bonds	1,780,980.00		
" 10 % warrants	11,239.71		
" specie for investment	4,148.88		
		1,796,368.59	
" " " distribution	1,124.20		
" " due on "	677.80		
" " specie contingent fund	977.00		
" Confederate notes due on distributions made	196,024.25		
" Confederate notes for distribution in 1865	35,626.74		
		231,650.99	
" treasury warrants fundable in 8 % bonds	281,567.33		
" treasury warrants fundable in 6 % bonds	7,256.00		
		288,823.33	
			2,319,621.91
Receipts Transfer.			
In Confederate notes, new issie, by am't one-tenth of the State taxes rec'd during two months, transferred from the State revenue account	3,358.26		
Loan:			
Confederate notes, new issue, by am't transferred from State revenue ac. until new issue is rec'd from the C. S. government in exchange for the old, this am't having been paid to counties on account of school fund due them. There was no new issue on hand in the school fund	7,814.32	11,172.58	11,172.58
			2,330,794.49

231 TREASURER'S OFFICE,
AUSTIN, *February 28th*, 1865.

C. H. Randolph, treasurer.

THE STATE OF TEXAS, }
County of Travis. }

I, R. W. Finley, comptroller of public accounts of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original of said instrument now on file in this department.

In witness whereof I hereunto set my hand and official seal this the 18th day of Jan'y, A. D. 1896.

(Signed) R. W. FINLEY,
[SEAL.] *Comptroller of Public Accounts.*

TREASURY DEPARTMENT,
AUSTIN, TEXAS, *Feb'ry 7th*, 1896.

I, W. B. Wortham, treasurer of the State of Texas, do hereby certify that the items set forth in the within statement are true and correct, as shown by the books of this office.

In witness whereof I hereunto set my hand and official seal the date above written.

(Signed) W. B. WORTHAM,
[SEAL.] *Treasurer.*

Plaintiff next introduced in evidence, over the objection of defendant, as shown by bill of exceptions No. 14, a statement or account headed "State of Texas school fund in account with C. H. Randolph, treasurer, for quarter ending on the 31st day of May, 1865," certified to by R. W. Finley, comptroller of public accounts, under his seal of office, on the 18th day of January, 1896, and also certified to by W. B. Wortham, treasurer, under his seal of office, on the 7th day of Februaiy, 1896, as follows, to wit:

232 The State of Texas school fund in account with C. H. Randolph, treasurer, for the quarter ending on the 31st day of May, 1865.

DR.

To disbursements as follows:

Transfers.

To amount of treasury warrants derived from principal and interest on railroad bonds for cancellation and substituted in this fund by 6 % State bonds, as *per contra.*

Treasury warrants fundable in 6 % bonds.	287,812.93		
Treasury warrants fundable in 6 % bonds.	32,554.20		
		.....	320,367.13
To balance cash on hand May 31st, 1865:			
Balance due on bonds of R. R. companies	1,753,317.00	1,753,317.00	
6 % State on account principal of do. paid in	27,663.00	27,663.00	
6 % State on account interest on do. paid in	292,704.13	292,704.13	
10 % interest warrants, including int. paid on same	11,239.71	11,239.71	
Specie for investment	4,148.88	4,148.88	
			2,089,072.72

Specie for distribution for schools	1,124.20		
Specie due upon distributions made.....	677.80		
" contingent school fund.....	977.00		
		2,779.00	
" Confed. notes, n. i., for dis'n.....	20,309.72	20,309.72	
			23,088.72
Disbursement by substitution for amount of bonds of railroad Co's (Washington Co.), reduced by payment on account of principal, and substituted by 6 % State bond-, *per contra*.....	27,663.00	.....	27,663.00
			$2,460,191.57

233 CR.

By balance cash on hand Feb'y 28, 1865:			
In balance due upon bonds of R. R. Co's.	1,780,980.00		
In 10 % interest warrants	11,239.71		
In specie for investment.....	4,148.88		
		1,796,368.59	
In specie for distribution to schools	1,124.20		
In specie due on distributions made... .	677.80		
In specie, contingent fund	977.00		
		2,779.00	
In treasury warrants fundable in 8 % bonds	281,567.33		
In treasury warrants fundable in 6 % bonds	7,256.00		
		288,823.33	
In Confederate notes, n. i., for dist'b'n..	4,509.04	4,509.04	
			2,092,479.96
Transfer-.			
In Confederate notes, new issue, amount transferred from revenue of State account, being one-tenth of the State taxes.....	15,800.68	.....	15,800.68
Received in 6 % State bonds:			
By account of 6 % State bonds, substituted in lieu of an equal amount of treasury warrants on hand on 13th May, 1865, on account of principal & interest on railroad bonds, under an act of the leg. app'd November 14, 1864, which warrants were transferred to State revenue, and cancelled bond No. 1 May 13, 1865, substituted for warrants on int. acc.	292,704.13		
Bond No. 2, May 13, 1865, substituted for warrants on acc. principal....	27,663.00		
		.....	320,367.13
			$2,460,191.57

TREASURER'S OFFICE,
AUSTIN, *May* 31, 1865.

C. H. Randolph, treasurer.

THE STATE OF TEXAS, }
County of Travis. }

234 I, R. W. Finley, comptroller of public accounts of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original now on file in this department.

In witness whereof I hereunto set my hand and official seal this the 18th day of January, A. D. 1896.

R. W. FINLEY,
[SEAL.] *Comptroller of Public Accounts.*

TREASURY DEPARTMENT,
AUSTIN, TEXAS, *Feb'ry 7th*, 1896.

I, W. B. Wortham, treasurer of the State of Texas, do hereby certify that the items set forth in the within statement are true and correct, as shown by the books of this office.

In witness whereof I hereunto set my hand and official seal the date above written.

[SEAL.] W. B. WORTHAM, *Treasurer.*

Plaintiff next introduced in evidence, over the objections of the defendant, as shown by bill of exception # 15, a statement headed "Statement of treasurer's receipts from revenue and other sources during the months of January and February, 1865," certified to by R. W. Finley, comptroller of public accounts, under his official seal, on the 18th day of Jan'y, 1896, as a true and correct copy of the original of said instrument then on file in his department, and also certified to by W. B. Wortham, treasurer, under his official seal, on the 7th day of February, 1896, as a true and correct statement, as shown by the books of his office, which statement shows treasurer's receipts from revenue and other sources during the two months stated to be as follows:

In new issue Confederate notes	$10,292.08
" specie	8,794.50
" treasury warrants fundable in 8 % bonds.....	9,820.91
" " " " " 6 % "	14,892.34
Total	$43,889.83

Plaintiff next introduced in evidence, over the objections of the defendant, as shown by bill of exception # 16, a statement
235 headed "Statement of treasurer's receipts from revenue and from other sources during the month of April, 1865," certified to by R. W. Finley, comptroller of public accounts, under his official seal, on the 18th day of January, 1896, as a true and correct copy of the original of said instrument then on file in his department, and

also certified to by W. B. Wortham, treasurer, under his official seal, on the 7th day of February, 1896, as a true and correct statement as shown by the books of his office, which statement showed treasurer's receipts from revenue and other sources during the month of April, 1865, to be as follows:

In specie.....	43.
" Confederate notes.....	172,231.22
" treasury warrants fundable in 8 % bonds..... ..	5,607.34
" treasury warrants fundable in 6 % bonds.....	5,074.00
Total.....	$182,955.56
From special loan tax (in Confed. notes)...	1,000.00
	1,500.00 in specie (cotton sales).

Plaintiff next read in evidence, over the objections of the defendant, as shown by bill of exception # 17, an extract from the recommendations of C. R. Johns, former comptroller, made in his annual report to the governor, as comptroller of public accounts, on the — day of November, 1861, in reference to issuing treasury warrants:

"There being no prospect of replenishing the treasury by a sale of State bonds, and as the tax of the present year will not be available before the middle of next summer, it becomes highly necessary to provide means for the support of the government until that time.

236 To thus provide and establish the par value of treasury warrants are objects worthy of the first and highest consideration.

The entire accomplishment of these important objects would certainly result from the plan already proposed, provided only that treasury warrants be made receivable for taxes and all public dues.

The fact that the proposed revenue will far exceed the amount of warrants to be issued will make the demand for warrants greater than the supply and render them equivalent to specie, thereby affording to the government ample means for present support and to the people great facilities for the payment of tax during the war, and the consequent scarcity of specie.

No embarrassment or inconvenience can possibly result from the policy of making treasury warrants receivable for public dues, provided only that the issue of warrants is limited to the amount of revenue required, which may be controlled by the legislature in making appropriations for that purpose.

A treasury warrant is simply an order on the State treasurer to pay to the order of the party a certain amount audited in his favor.

Should the State treasurer have no funds for the payment of warrants, an act of the legislature making them receivable for

public dues is in effect only to authorize such other financial agent of the State as may have means to redeem the same.

The issue of warrants or audited scrip may at times become necessary to meet extraordinary emergencies, or to avoid this necessity a safety fund should be provided and retained in the treasury sufficient to meet such demands, which, indeed, would be less objectionable than to resort either to the uncertain means of borrowing money or to the issue of warrants or scrip of any kind, yet it cannot be denied that the commercial habits and necessities of the country and the progressive and enterprising disposition of the government and people sometimes demand the use of credit
237 in place of coin as an irresistible public necessity. Under no circumstances should anything but specie or audited drafts on the State treasurer be made receivable for public dues. To make any other description of paper receivable for State dues to be again issued would not only be obnoxious to law, but highly detrimental to the credit of the State.

The State being in debt, her own liabilities should be preferred to all others, and after the State debt had been paid by the issue and redemption of warrants, as proposed, the revenue for the ordinary support of the government should forever be collected in specie. Should it be found necessary to continue the issue of treasury warrants, and should such measures be adopted as will preserve the par value of same, it will be quite unnecessary to continue the issue of interest warrants, since it is manifested that the interest adds but little to the value of such issues.

This is the only practicable method known to this office under existing circumstances by which the good faith and credit of the State may be preserved, the public debt promptly paid, and available means furnished to meet the present necessities of the government."

(Report of C. R. Johns, comptroller, page 108.)

"No action has yet been taken under the law authorizing the funding of the military debt, though it is probable that a small amount may be funded prior to the meeting of the legislature.

This law, though beneficial to capitalists, will never affect the desired object of rendering treasury warrants available at par to first holders" (same, page 115).

Plaintiff next read in evidence, over the objections of defendant, as shown by bill of exceptions No. 5, a part of the message of Governor Lubbock, dated November 15th, 1861, to the regular session of the ninth legislature of the State of Texas, as follows:

238 The finances of the State is at all times a most important question, and becomes more than ordinarily so in the present crisis. In the condition of the country at this time, and the consequent derangement of all monetary matters, it would be impossible, even were it good policy, for the State to negotiate a loan. Our people well understand this, and are prepared to meet any reasonable demand made upon them by way of taxation.

The very able report of the comptroller demands at your hands the most careful consideration. By it you will see that the probable receipts for the two fiscal years ending 31st day of August, 1863, exclusive of the ten per cent. due to the school fund, amount to $976,651.24. The expenditures for the same period of time to support the civil government amount to $608,810. In addition to this necessary expenditure, he reports that there will be required to liquidate the estimated indebtedness of the State, 1st, for outstanding ten per cent. treasury warrants issued up to 1st September, 1861, $290,903.63; 2nd, unaudited claims:

Am't due	Col.	Ford's command, on the Rio Grande.....		$130,000
"	"	" H. E. McCulloch's, on the N. W. frontier..		20,000
"	"	" Ford's regiment, raised by the convention while in State service		30,000
"	"	" Dalrymple's command, on N. W. frontier..		17,000
"	"	minute companies for 1860 and 1861.....		40,000
"	"	for other services.....		37,000
"	"	for obtaining and turning over property captured from the United States		100,000
"	"	for purchase of Colt's pistols.....		25,000
"	"	" Gregg's, Parson's, Lock's, and Sim's regiment.....		250,000

The audited and unaudited debt aggregating the sum of $939,903.63, which added to the sum necessary to the support of the civil government makes the sum of $1,548,713.63, which amount is required for the support of the civil government up to the end of the fiscal year ending 31st August, 1863, and to liquidate the
239 audited and unaudited debt of the State as estimated up to the 1st September, 1861.

It will thus be seen that the sums required for the support of the civil government for the two fiscal years ending 31st August, 1863, and for the payment of the present outstanding debt of the State amounts to $572,062.39 over and above the estimated receipts for the same period of time.

These are demands and expenditures that we know must be provided for, leaving out of view any additional amounts that Texas may be called on to raise to aid and assist the Confederate government in prosecuting the war and which she may find necessary to expend in the protection of her own soil.

In order to meet the deficit manifested in the report of the comptroller, he advises an increase of taxation to 25 cents on the $100 worth of taxable property in the State and a reduction in the price of the public lands to fifty cents per acre. I here call your special attention to this portion of the report, and urge upon you to give it mature and deliberate consideration, believing as I do that the sales of public lands, even at the reduced price proposed, will fall far short of the amount estimated by the comptroller, and that we must rely almost entirely on taxation.

No one regrets more than I do the necessity of increased taxation at this time of peculiar hardships upon the people, particularly

when I am so well aware that for the past eight months our citizens, with rare exceptions, have responded so liberally and generously to the support and comfort of those gallant spirits in the field, but we must bear in mind that we are engaged in a contest for liberty, equality, and right of self-government. To secure these our home and general government must be sustained at a sacrifice.

Under these circumstances I deem it imperatively necessary that at least the rate of taxation proposed by the comptroller should be levied for the relief of the treasury during the next two years.

240 The present tax for county purposes is deemed sufficient, inasmuch as they are now generally supplied with their public buildings and the contingent expenses of the courts being greatly reduced by their partial suspension. Should, however, any of the counties, from their spirit of liberality in making advances toward the equipment of troops and otherwise aiding in the struggle, find it necessary to ask permission to levy a further tax than that allowed by law, I would advise a generous consideration of such application.

The treasury at this time having no gold or silver in its vaults, it becomes necessary for you, by legislation, to provide means for carrying on the civil government until such time as the treasury shall be in receipt of its usual revenues for this purpose. From the limited information now in my possession, I can point you to no better mode than the issue of treasury warrants, payable at the treasurer's office out of any moneys not otherwise appropriated. I would suggest, however, that hereafter the warrants should be so issued as to bear no interest.

The treasury warrants now outstanding and bearing ten per cent. interest are selling at a most ruinous discount, and I can safely say that the civil government cannot be supported by the issuance of treasury warrants unless you, by some legislation, shall cause them to appreciate to at least near their face value. To accomplish so desirable — result I would suggest to you to take into the consideration the propriety of making all the warrants heretofore issued, as well as those which may be hereafter issued, receivable in payment of taxes and for all other public dues of whatever nature or kind.

Esteeming it as I do the duty of our State, as well as the duty of every citizen, to sustain by every means in their power the credit of the Confederate States, I cannot but recommend that the treasury notes issued by that government be, by an act of the legis-

241 lature, placed on the same footing as the warrants issued by our State treasury, and that they also be made receivable in payment of all public dues.

Plaintiff next read in evidence, over the objections of defendant, as shown by bill of exceptions No. 6, a part of the message of Governor Lubbock, dated February 5th, 1863, to the extra session of the ninth legislature, as follows, to wit:

State Finances.

There was received into the treasury on account of State revenue from the 1st day of July, 1862, to Dec. 31st, 1862:

To amount on hand January 1st, 1862	$13,366.67
From $\frac{9}{10}$ State taxes, licenses	346,305.39
" sale of land scrip	28,138.29
" sale of State bonds	183,995.07
From financial agent of penitentiary	148,278.88
" other sources	28,495.78
	749,080.08
Amount disbursed during same time	746,597.80
Leaving balance on hand Jan. 1, 1863	2,482.28

The military board have sold 460 State bonds of $1,000 each, from which they realized $476,420.60, 100 of which amount, as above stated, they paid to account of State revenue, $183,995.07, leaving them properly chargeable with $292,427.53.

Under the law to regulate and authorize funding in State bonds, approved 13th Jan., 1862, amount funded $196,000, making in all of loan bonds disposed of 656; 210 bonds remain to the credit of the military board to meet contracts made and future liabilities growing out of contracts.

There has been disbursed from the treasury in payment of liabilities on military account incurred prior to January 1st, 1862, $837,452.52; upon liabilities since 1st Jan., 1862, to Dec. 31st, 1862, $509,535.46.

There has been expended on civil account during the same
242 period, including $55,026.84 on account of the ninth legislature, $267,911.25.

The outstanding liabilities of the State 1st Jan., 1863, are in 8 per cent. bonds	656,000.00
In 10 per cent. int. warrants	135,000.00
In treasury warrants, without interest	888,875.72
	$1,679,875.92
Estimated amount of unaudited claims for military services prior to Jan. 1st, 1862	150,000.00
For frontier regiment	350,000.00
	$2,179,875.72

Of this amount about $1,000,000 is in payment of debts and military services incurred prior to 1st Jan., 1862.

It will also be borne in mind that the claims of the State against the Confederate government will not vary far from the entire indebtedness of the State.

From the increased demands likely to be made upon the treasury, the facility with which our citizens can procure the means to pay their taxes, and the importance of reducing State liabilities as rapidly as possible, thereby appreciating the balance, I feel no hesitation in recommending an immediate increase of the tax to one-half of one per cent., exclusive of the loan tax.

The receipts likely to come into the treasury during the year, arising from the present rate of taxation and other ordinary sources, will amount to about $500,000, $300,000 of which will be required for the support of the civil government, leaving only $200,000 for the redemption of unpaid treasury warrants, the protection of the frontier, and the general defense of the State. A tax of one-half of one per cent. would yield $1,000,000 revenue, which would soon relieve the State from financial embarrassment.

The amount of the special specie tax assessed for 1861 amounted to $112,302.30, of which sum there has been paid into the treasury $90,491.65, being almost as large a percentage as the amount collected in currency.

243 The fact of the State having pledged her faith to pay the interest on her loan bonds semi-annually in specie has caused these bonds to be much sought after, and the board appointed for that purpose could long since have disposed of the entire amount authorized by law. The board have, however, preferred to use them only as the necessities of the treasury required it, thus saving a large amount of interest to the State. I trust the legislature will not disturb the position which this loan occupies to our people, as our citizens readily responded to our wants and invested their means, when solicited, in these bonds, relying upon the punctual payment of the interest in specie.

There is now in the treasury a sufficient sum to meet the interest on the entire million of bonds for one year, and I believe there will be a sufficient amount collected to meet the interest as it becomes due; but, to guard against any contingency, I trust the legislature will empower the comptroller and treasurer to make such arrangements as will secure a sufficient amount of specie to place it beyond doubt. It can be done very easily, and our faith kept and our credit sustained.

We know not what a few months may bring forth. The necessities of our country may require us to raise large sums to defend the State. Let us, then, do nothing likely to impair our credit; and, when called upon, rest assured our citizens will respond with their last dollar.

I most respectfully suggest that the law authorizing the funding of State warrants in the present loan bonds be immediately repealed. The amount of warrants presented for funding is increasing daily, and the fact of our State bonds bearing specie interest causes them to be in greater demand for funding than the bonds of the Confederacy. In the present condition of the country and of the currency, I think 8 per cent. interest on the State debt too high, and, should you deem it best to continue the funding of State liabil-

ities, I would recommend that bonds be issued expressly for
244 that purpose, and that they bear 6 per cent. interest.

By an act passed at the last regular session of your honorable body, Confederate treasury notes received into the treasury can only be paid out for military purposes. I presume the object of the law was to secure the most available means for military objects. The facts now show that the State warrants are more appreciated than the Confederate notes; hence I would respectfully suggest that the law be repealed and that Confederate notes be paid out as other funds for all purposes, because the revenue is principally collected in those notes, and there may be times when they are not required for military purposes and would save the drawing of large amounts of warrants, thereby lessening the amount of State liabilities. There can certainly result no injury to the State from this source.

I believe that by pursuing the course indicated there will be no necessity to put in the market before the regular session of the legislature an additional number of bonds over the amount now authorized to be sold.

At the last session of your honorable body the 16th section of the tax law was amended so as to postpone the forced collection of taxes until the 1st day of August succeeding the return of assessment-rolls, etc. At that time there was a great scarcity of money in the country and it was done to give time to put money in circulation. This delay postpones all settlement with the assessors and collectors until after the fiscal year, which ends in August, and causes much confusion in closing accounts in the comptroller's office. As there is no longer any necessity for such postponements, I respectfully suggest the repeal of the amendment.

The plaintiff next read in evidence, over the objection of defendant, as shown by bill of exception No. 7, from the message of Governor Lubbock, dated November 5th, 1863, to the regular session of the tenth legislature, as follows, to wit:

245 *State Finances.*

I beg leave most respectfully to call your attention to the very able biennial report of the comptroller ending August 31st, 1863, and to solicit at your hands a careful consideration of the many valuable suggestions made therein.

The report shows that there was a balance on hand August 31st, 1861, to credit of State revenue	$36,866.34
Receipts from nine-tenths of Texas	652,433.32
Do. sale of land scrip.....	129,097.00
Do. refunding to appropriations.....	124,792.81
Do. sale of public property, office fees, &c..	75,791.02
Do. sale of State bonds.....	212,015.70
Do. penitentiary....	500,000.00
Received by transfer from school fund.....	703,843.88
Do. transfers from university fund.....	41,521.40
	$2,468,361.47

Disbursements for the Two Years Ending August 31st, 1863.

For civil service	89,165.24
For military service	2,031,612.54
By cancellation of treasury warrants	331,763.96
Balance on hand	15,819.73
	$2,468,361.47

State Debt.

Treasury warrants drawn during the two years and yet outstanding against the treasury	$1,343,922.31
10 per cent. warrants outstanding	181,565.41
Interest on the above (estimated)	40,000.00
8 per cent. State bonds issued	891,000.00
Amount borrowed from school fund	680,325.00
Do. university fund	187,403.73
Do. settlement of estates	16,403.35
	$3,340,619.80

246 *Estimated Receipts for the Two Years Ending August 31, 1865.*

Balance on hand Aug. 31, 1863	15,819.73
Amount due on taxes of 1862	220,000.00
Do. of taxes to be collected for 1864 and 1865	3,141,200.00
Do. from penitentiary	1,000,000.00
Do. from Confederate States	1,950,000.00
Do. from military board, return of U. S. bonds	584,000.00
	$6,911,019.73

Estimated Disbursements for the Two Years Ending August 31, 1865.

For civil service	707,177.43
" frontier defense	2,000,000.00
" payment of audited debt	3,340,619.80
" payment of unaudited debt	200,000.00
	$6,247,797.23
Deducting this from receipts for same period	6,910,019.73
Shows an excess of	$663,122.50

in the revenue over all demands upon the treasury.

The comptroller in his report remarks: "Should the expense of frontier protection be transferred to the Confederate States, there will be at the end of the next two years an excess of $2,663,122.50 of revenue over all liabilities at that time, in which event, should the claims against the Confederate States remain uncollected, there would still be an excess of $713,122.50. To meet extraordinary demands not estimated for, and as a means of sustaining credit in the meantime, it is recommended that the price of land scrip be reduced to

50 cents per acre in State liabilities; that money and credit be subjected to tax, and that the tax laws be so amended as to cause a more thorough and prompt assessment and collection of taxes. With such amendments the revenue of the next two years, if collected in available means, will be sufficient to absorb the floating debt and furnish
247 the basis of a sound credit sufficient to meet all probable demands. The present rate of tax is therefore considered high enough for all State purposes."

I cannot but admit that our currency is at present in a very depreciated condition. Many causes are assigned to account for this condition of things. I presume it is attributable mainly to the large issues of the Confederate government in treasury notes. Another prominent cause is the trade carried on by our people with Mexico, where paper representing money is not current. To carry on that trade, so valuable has specie become that the great demand for it has caused little or no value to be placed on the articles that will not command specie; hence one great cause of the low price of Confederate money. I believe the taxes now in process of collection and the gathering of tax in kind (rendering unnecessary thereby so great an issue by the Confederate government), together with the aid of the impressment law, fixing the maximum prices upon articles required by it, will have the immediate effect of appreciating the currency. I feel the assurance that in this section of the Trans-Mississippi department the currency will be greatly appreciated in a very short time.

Plaintiff next read in evidence, over the objection of defendant, as shown by bill of exceptions No. 9, from the message of Governor P. Murrah, dated May 11th, 1864, to the called session of the 10th legislature, as follows:

The Currency.

Congress owned the fact that the Confederate currency was almost worthless, and provided for its withdrawal from circulation. The act was bold, if not approved by wisdom and good faith. It was an act of financial destruction if not of financial skill. They created—they destroyed. I have no comments to make. I shall deal with the legislation of Congress as it affects the finances of the State.

248 In regular session last winter, in a spirit of patriotism and for the purpose of sustaining the Confederate currency, you made all the appropriations in it. You authorized the taxes to be collected in it, and the obligations of the State to be paid from it. You believed that Congress would provide in some way to sustain the currency. After the first of July, if the currency is paid out at all from the treasury, it must be at a discount of 33⅓ per cent. of the dollar, and on the one-hundred-dollar notes at a still greater sacrifice. One-tenth of the annual taxes making the common school fund shares the same destiny. This heavy discount is upon a currency rating from twenty to thirty to one in value in comparison with specie. What proportion of the taxes has already been

collected and what proportion is yet to be collected I am not informed; but it is beyond controversy that this accumulation in the treasury is almost worthless, and that measures must be speedily adopted to relieve the State from this embarrassing position. Whether the collection of taxes in the present currency should not be at once arrested and the disposition of what is already collected and what may yet be collected is for your consideration. I believe that it should be exchanged for the new issue. The State cannot afford to hold it and fund in bonds. This would at once deprive her of the means provided by law to meet her pecuniary obligations. When this exchange can be effected I am not informed, but that it should be speedily done is evident. The State, so soon as the necessary measures can be put in operation, should cease to pay out this currency. After the first of July, if it can be avoided, no payments should be made with it. Whether the old can be exchanged for the new issue and taxes gathered in the new with sufficient expedition to meet the wants of the government is a matter for your immediate inquiry.

It is necessary to look beyond a few months or mere temporary arrangements in reference to the financial policy of the State.

249 The new issue of treasury warr-nts was very properly arrested to prevent them from being paid out in connection with Confederate notes and at the same depreciated rates.

The question is now distinctly propounded to you and must be answered by your legislation whether you will continue the same system, depend entirely upon Confederate notes in all their fluctuations and rapid changes as to value and form, or adopt a different system. The system has been fully tried, and the results to the State are fully before you. The new currency will doubtless be better than the present, and may continue so for some time, but how long none can tell. What value will be placed upon the new issue is for the future to determine; but the habit is established by the people in the use of Confederate money or receiving and paying it out at its market value. The Confederate government has not only proclaimed the present currency depreciated, but it long since taxed gold in proportion to its superior value over Confederate notes.

It is certain that a revolution has taken place in the minds of the people and the general government on the subject of currency. A more firm basis is being looked for, and specie is being recognized as the standard by which to determine the value of the paper currency. It is useless to deny the fact or attempt to conceal it. Every day transactions from Richmond to San Antonio prove it. The currency is treated as depreciated, and is so estimated in buying and selling, and the habit being so generally established will certainly continue until the currency ceases to be depreciated and is regarded as sound. I do not believe, however, that the State and the people should forget the obligation to sustain it as far as possible by making all the sacrifices that can be expected. The question, however, is presented whether or not the State alone shall continue to receive this currency at par, and, if so, whether she can

continue to conduct her operations and discharge her pecuniary obligations.

If, however, the policy is to be continued of relying alone upon the Confederate currency, the issue of treasury warrants should
250 be avoided, if possible, for the reasons heretofore given.

If a different financial system is to be adopted, what shall it be?

I confess that the pressure of engagements has prevented me thus far from giving that full attention to the subject which its great importance demands and which is necessary to the formation of views which could be recommended as decided convictions.

But the interest of the State requires that the subject should be thoroughly canvassed, and it might be considered whether the assessments of 1860 or 1861 might not be taken as a basis of value—taxes collected in State treasury warrants, coupons of State bonds at par, specie, and the Confederate currency at its value in the market. Treasury warrants could be substituted for the coupons as they were paid into the treasury and a provision made for funding *made* the warrants in six per cent. bonds whenever too many of them were found in circulation. The fact that the coupons were received in payment of taxes would increase, in all probability, the value of the bonds, and at the same time diminish the amount of specie necessary to redeem the coupons. It might not be necessary to fund any of the treasury warrants for some time to come, perhaps not until the war shall end, as they would become a circulating medium and be sought for by the tax-payer. Under such a system the taxes might be greatly diminished and yet be of greater value. It is not my purpose to elaborate, but merely to call your attention to this subject.

I am aware that it would require time to depart from the present system, and to put into operation such *an* one as is indicated above. There would be difficulties to overcome. It would practically be found difficult to determine the value of Confederate notes in a manner satisfactory and just to all portions of the State. The government would have to be provided for until taxes could be collected under such a system, and how far the
251 present currency and the new issue will meet the want and in what manner it should be employed for the purpose would be for your consideration. The taxes that may be remaining in the treasury on the first of July will be diminished in amount one-third by the operation of the law of Congress, unless funded in the six per cent. Confederate bonds.

It is at all times important to sustain the credit of the State, and now that we are so isolated from the government at Richmond, it is even more so. Her credit in the progress of this struggle may not only be essential to the safety of the State, but important to the whole Trans-Mississippi department. It should, therefore, be guarded and cherished with great care. The resources and position of the State will enable her to carry a very large debt should it become necessary; and it is for you to determine whether the interest on the bonds outstanding shall be regularly paid or not. It is im-

portant that it should be done, and it can be, provided the State is unembarrassed in a judicious plan of purchasing and disposing of cotton.

The plaintiff next read in evidence, over the objections of the defendant, as is shown by bill of exception No. 10, the message of Gov. Murrah, dated October 20th, 1864, to the second extra session of the tenth legislature, as follows:

Governor's Message.

EXECUTIVE DEPARTMENT,
AUSTIN, TEXAS, *October 20th*, 1864.

Senators and representatives:

I have convened you again in extra session mainly with reference to the finances of the State. I regretted the necessity, but I believe that the public interests imperatively require it.

The treasury warrants authorized to be issued by the law ap-
252 proved on the 28th day of May last are rated so low in value that they will, in all probability, fail to accomplish the end designed by your legislation. They are quoted at this time in market at from eight to ten cents on the dollar. Before another regular session of the legislature nearly, if not quite, two millions of these warrants, under the operations of that law, would be outstanding as a debt against the State, to be funded in bonds and ultimately to be redeemed in specie, and yet from present indications not over ten cents on the dollar will be realized to the State in the objects proposed. The plan provided for keeping up the value of these warrants is not attended with the requisites and conditions necessary to make such a plan efficient. It would be necessary, in order to make the plan successful in preserving the credit of the State and to keep up the value of these warrants, to satisfy the public mind in advance as to the quantity of specie that could be controlled for the purpose named in the law and as to the period at which it could be so employed. The assurances that specie may be so used when it may be found in the treasury is not a sufficient guaranty to inspire the necessary confidence. I consider that experience has established that treasury warrants at the present time can only be kept up at a just appreciation by creating for them a general and constant demand approximating to the amount issued. The 8 per cent. bonds now outstanding, on which the interest has been regularly paid except for a short period since the first of July last, are rated in the market at 25c. on the dollar or less, and yet the law has been observed in discharging the interest upon them. There is much more certainty both as to the proportion which the specie interest bears to the amount of these bonds and as to the regularity of its payment than is given to the public mind in the law referred to, as to the amount of specie to be used and the periods when to be used in the purchase of these warrants. It follows, then, that if these issues from the treasury are to be made

in the future and the credit of the State preserved, that a plan must be devised which will create for them a constant and general
253 demand, approximating to the amount to be issued.

I was exceedingly anxious to carry out in full the law referred to and had arranged my plans and made every effort to do so in order to secure the credit of the State and to give value to the warrants authorized to be issued mainly for the support of the dependants of officers and soldiers. This was the sole means provided for the support of the civil government and the class of indigents already referred to, and to diminish the value of these warrants was, of course, to diminish the value of the support. These warrants were in fact to supply the place of the C. S. notes of which you anticipated the treasury would be deprived as an available fund for a time by the legislation of Congress upon the currency. Previous to that time the State had been relying almost exclusively upon the Confederate currency to meet her appropriations and discharge her obligations.

Circumstances, some of which have been already made known to the public, prevented me from carrying out the provisions of that law only in part. Exhibits (A) and (B) herewith presented will furnish you with some of the reasons which influenced me. They were founded in what was represented to me to be the absolute and pressing necessities of the soldiery. In ceasing to execute the plan which I had inaugurated, save in part, I yielded to what I believed at the time, all things considered, the best for the country.

As the objects proposed by this law cannot be realized, it should be repealed and other measures resorted to which will be more efficient.

Your anticipations did not fail as to the result which the legislation of Congress on the currency would have upon the funds in the State treasury, but since your adjournment an act passed by Congress on the 4th of June last extended to the State the privilege of exchanging one-half of the Confederate notes of the denomination of one hundred dollars for the new issue, instead of funding in bonds.

254 On the 31st of August last there was in the treasury $1,983,238.56 in Confederate notes over the denomination of five dollars and $25,065 of the denomination of five dollars and under, and of this amount nearly one million and a half was of the denomination of one hundred dollars. Of this entire sum $1,539,338.82 stands to State revenue account. You are respectfully referred to the annual report of the treasurer and to the accompanying statements of the comptroller. It will be seen from this that there is no money in the treasury available for the ordinary expenditure of the government, nor can it be made available until exchanged for the new issue. When this exchange can be made I cannot inform you. The Hon. P. W. Gray, representative of the C. S. treasury, gives assurance that the exchange will be made so soon as he is supplied with the new issue for that purpose, but it is uncertain as to the time. There is also due to the State, in the new issue, from the Confederate government over one million of dollars for products of the penitentiary and other property sold within the last few months.

But when this will be paid is not known, although efforts have been made to gain the information and to collect it. It is to be hoped, however, that these funds will be obtained before a great while.

What is to be the value of the new issue when put in circulation and what new changes and regulations Congress may make in the laws regulating the currency are matters of uncertainty, and furnish additional and serious embarrassment in considering the finances of the State and any future policy in regard to them, dependent as they are and have heretofore been upon that currency. Since the commencement of this struggle the State has relied almost exclusively upon Confederate notes in the discharge of her obligations and in conducting her public affairs. This policy has been observed for the purpose of upholding and sustaining that currency, and in order to co-operate in every practicable way to give strength and credit to the Confederate government.

255 We have reached a point connected both with the finances of the State and the currency of the Confederacy that makes it absolutely necessary to consider and determine again whether this policy can longer be exclusively pursued, and the State government sustained, and her obligations and duties discharged. So long as this contest shall continue for all that is dear to us as a people, the same policy shall be observed, so far as consistent with cares and duties devolving upon the State and inseparable from her as a State. A departure from it must be authorized and demanded by necessity in order to be reconciled to sound policy, and such is the feeling of the people and of the authorities of Texas. But the force of changes must be recognized and facts met and dealt with as they present themselves.

One of the leading cares and duties devolved upon the State government at this time is to provide support for the indigent and dependents of soldiers. This is an obligation which she cannot neglect. It is a measure directly connected with the prosecution of the war, and the support of the family of the soldier is as necessary as is the support of the soldier. If his family suffers, he will suffer. The means provided for the accomplishment of this object should be adequate and certain. The duty of providing these means, in the main, is devolved directly upon the State government, and the burden should be equally borne by all the taxable property of the State. To leave the support of this class of persons exclusively to the counties would be unjust and oppressive to many of them. The number of those for whom provision must be made by the public is not in proportion to the amount of the taxable property in the respective counties. Harrison, for instance, pays taxes on $8,156,942 worth of property, and yet the dependents to be provided for in that county number only 897, while Henderson county pays a tax on property to the amount of $1,923,710 and the dependents in that county number 789. Such disproportion between the property and the number of the indigent exists throughout the counties of the State. The number to be provided for is 74,000.

256 How, then, is provision to be made for this class of needy and in what shall it be provided? Will you make the provision in Confederate money? Is not this currency too uncertain

in value to admit of any reliable calculations as to the permanency or adequacy of any provision depending on it? It is confidently believed that the new issue of Confederate notes will be of far greater value than the old, and yet this belief cannot be relied on as a basis for certain calculation. There is another thought which should not be overlooked in considering this subject. The Confederate currency has been and will, in all probability, continue to be of much less value in the purchase of the necessaries of life in some portions of the State than in others. In consequence appropriations made for a given number of dependents in one section are not equal in value to a like appropriation made for the same number in another section. This condition of things has been brought about by facts over which these dependents had no control, and which the State itself could not control. It is certain, therefore, that if an adequate provision is to be made for this object in Confederate notes, that the appropriation must be greatly increased, but how much increased in consequence of the uncertainties already referred to it is impossible to determine with any degree of certainty. An increase that would be sufficient in this appropriation will involve the necessity of increased taxation.

In providing for an increased tax, it is for you to determine whether this money shall be collected and paid out without reference to its value or whether it shall be collected and paid out at a fixed rate, some basis of value being established. This subject was before you at your former session, and further suggestions from me are deemed unnecessary. It is not deemed improper, however, to say that I do not consider the value of the new issue as yet fixed, and that it may be better than might be inferred from present quotations when the full effect of the laws of Congress upon the currency shall be made known.

257 Can any other plan be devised by which this object can be accomplished and save the necessity of the use of increased quantities of Confederate notes or a resort to new issues from the State treasury? If so, it would be most desirable.

The only substitute for a tax in money for this purpose is a tax in kind on the products of the soil, and such a tax, as it seems to me, will be attended with great difficulty. There is already a tax of this character imposed by the Confederate government. An additional one levied by the State will complicate the system and embarrass its execution; and it will also be found a difficult task to proportion a tax on property not devoted to agriculture, and on incomes from other sources to the value of the tax imposed upon the production of the soil and, besides, the collection and distribution of such a tax, if imposed by the State and made uniform, would be attended with serious inconveniences, if practicable at all. The largest amount of supplies, if thus collected, would be in counties where least needed and the smallest amount, in many instances, in counties where most needed. This would involve the necessity of transporting from one county to another, and a redundant supply would often be found too remote for transportation to points where a deficiency might exist, and hence would arise the necessity of

disposing of the productions where they could not be consumed, or of not collecting them at all. These considerations, as it seems to me, would render this system unsatisfactory and unacceptable, and yet it deserves full consideration.

Owing to the depreciation of the Confederate currency and the embarrassments connected with the treasury from that cause, the support of the civil list of the State government merits your most serious consideration. If the salaries of the officers and employés are to be paid in that currency, without any increase in the amount, they will be merely nominal in value, as the money is now depreciated and it becomes a serious question whether the affairs of the government can long be conducted with proper efficiency and vigor.

If the contingent expenses are also to be provided for in this cur-
258 rency they can only be discharged at its market value. The civil list proper requires about $300,000 annually, and at thirty for one in specie this sum equals only $10,000, and yet for months past, in a large portion of the State, those receiving this money from the treasury at par have been forced to pay it out at this rate of depreciation and often greater. Other States, as I am informed, though not with accuracy and certainty, have been forced to recognize this depreciation and to conform their policy to it by providing for additional pay for their officers and employés. The Confederate government, influenced by the same cause and by the same necessity, has provided additional means for the support of its employés and its officers in the field. The officer, as I understand, is now allowed a daily ration and the privilege of purchasing another at the cost of the government and also clothing at the same cost, but as to the amount I am not informed; and, besides, when stationed in a town or city he has commutation for quarters, wood, etc., which affords him additional means of living. It is true that the pay of the soldier is nominal, but he is fed, and the clothing that he is compelled to purchase is procured at its cost to the government. The employee of the State government has no such privileges, and no such provision is made for him, and the money which he receives for his wages or salary he is forced to pay out at its depreciated rates for the means of living. This oppression to the employé in the civil departments of the government does no good to the soldier and furnishes him with no additional comforts. Indeed, the State employé is often himself a disabled soldier or one unfitted for service in the field and is yet employed in service essential to the conduct of public affairs. At present many a tax-payer who receives Confederate money at its market value pays it into the treasury in discharge of his taxes at par, and it is paid out at par by the government in discharge of her obligations, and of course the loss by depreciation falls upon its creditors and servants.

259 It is true that all tax-payers do not receive this money at so great a depreciation, but it may be said that nearly all receive it with a greater or less depreciation allowed upon it.

Why this course of policy should be continued or considered just is difficult to perceive. The people have not surely lost interest in having their State government properly supported and conducted, and

I cannot believe that with a proper understanding of this subject that they will be unwilling to provide the necessary means. To sustain the organization of the State government in completeness and vigor and to enable it to discharge its duties promptly and justly is not to weaken but to strengthen the cause in which we are engaged; it is not to produce but to prevent confusion in public affairs; it is not to oppose but actually to co-operate with the Confederate government in all that involves the public interest, for the duties and obligations devolved upon the State are different from those devolved upon the Confederate government, and yet their discharge is essential to the welfare of the people. In considering the additional amount in this currency necessary for the purpose under discussion the same embarrassments are met which were enumerated in alluding to the subject of the support of soldiers' families. But to recognize the depreciation of the Confederate currency is not to depreciate it, but only to recognize an existing fact in order to regulate a policy according with it.

Congress was forced to recognize the depreciation of the currency before measures could be adopted to remedy the evil, and it is to be hoped that the measures already adopted, and those that may hereafter be, will be ultimately successful in accomplishing a result so essential. There is patriotism enough in the people to sustain any measure necessary to this end, and for the accomplishment of an object so closely interwoven with the cause of our country let citizen and public servant zealously labor and co-operate together.

260 A plan should, if possible, be devised which could, with reasonable certainty, be relied upon to support both the government of the State and the indigent dependents of soldiers, and which will, at the same time, be as little oppressive to the people as possible. The support comes from the people and must come in some form or other. Should you fail to adjust a satisfactory policy for the State finances based upon Confederate currency, I respectfully ask a full and mature consideration for the following suggestions. Authorize the issuance of treasury warrants in sufficient quantities for the accomplishment of these purposes and the support of the asylums and impose a tax which will annually absorb a certain proportion of them. The warrants issued for these purposes would be distributed to all the counties of the State, and thus be placed in reach of the tax-payers. A constant and general demand for them would be created and a tax which would absorb annually, say, three-fourths of the amount issued or a smaller proportion would perhaps be sufficient to keep them up at a high value. It is believed that one million or one million and a quarter of dollars annually in warrants, if their value can be well sustained, will accomplish these objects in connection with other provisions that will be suggested for the benefit of families of soldiers. Set apart a given amount of the products of the penitentiary, say one-third, and if that is not sufficient, more, for the benefit of the different counties, according to the number of dependents to be provided for. For those counties that do not apply for their

proportion of the goods, let the goods be sold and the proceeds distributed to them. At present, while some counties receive products from the penitentiary, others do not, and they receive nothing as an equivalent. These goods might be sold, if thought best, for the treasury warrants proposed to be issued; but the interest of the counties for whose benefit they may be sold should control in this matter.

261 In addition to this, give to the counties as large a discretion as can be given under the constitution to levy just such a tax for the benefit of these dependents as is best suited to the condition of the county in respect to currency productions, &c. The limit of the tax must of course be fixed by law, but beyond that the discretion should be as unlimited as possible, or a tax which would be valuable in one county and in one section of the State would not be valuable or available in another. Caldwell county is already empowered by law to levy a tax in specie for the purpose under discussion, and the chief justice informs me that the end is well accomplished and the people satisfied.

The State possesses other resources through which the treasury warrants proposed to be issued might be absorbed without imposing a tax and their value preserved, some of which could be made entirely reliable for this purpose and others not altogether so much so. To some of these I will refer, but cannot recommend a resort to them for the reasons which I shall give.

Land scrip might be sold and payment in them received, but sound policy forbids the issuance of land scrip until the war shall end and our citizen soldiery return home. Real estate is known to be at a low estimate at this time, and scrip would have to be sacrificed if sold. The consequence would be that they would fall into the hands of the money dealer and the land speculator and be hoarded for future profit, and the public domain would be thus frittered away and but little advantage received in return to the State. I have not changed my view that the public domain should be reserved and guarded for the purposes named in a message heretofore delivered to your honorable body.

All the products of the penitentiary might be disposed of for these warrants, but this would deprive the soldiery in the field of them. The demand for these goods on the part of the army is constant and urgent. The representations that they are needed for the

262 benefit of the soldiery come not only from the headquarters of the Trans-Mississippi department, but from officers of Texas in command of Texas troops. If this necessity does exist, the soldiery should not be deprived of these goods. If it were certainly known that the Confederate authorities could for the future provide a sufficient amount of clothing for the army, these products might then be disposed of in the manner mentioned. But the condition of things in this department does not warrant a reliance on this so strong as to authorize a policy which would cut off our soldiery from what clothing they may receive directly from that institution. I believe that after fixing by law the proportion of the products to be reserved for the benefit of the families of soldiers that the

remainder should go to the army, as heretofore. This conclusion is based upon the constant and strong representations made to me as to the necessities of the soldiery, as above stated. If you have doubts as to the soldiery receiving the benefit of those products, make such regulations as will secure the benefit to them. I believe myself that they go to the benefit of the army; but whether the application of them is always most judicious or not I cannot say. It will be considered that there are other pecuniary obligations imposed on this State besides the discharge of the civil list and her obligations to the families of soldiers, and the means for discharging these obligations can be derived from the penitentiary by observing the plan indicated.

The frontier organization is to be provided for and paid, and there are many other requirements of the State that involve the expenditure of money. The special loan tax levied in specie to pay the interest on State bonds might be collected in these warrants and would absorb about $80,000 annually. If the interest on railroad bonds was collected in them, it would absorb about $104,000 annually, but no certain reliance can be placed on the collection of this interest in the absence of compulsion of law.

263 The supposed assessment of taxable property for the year 1865 will reach $400,000,000. A tax of fifteen cents on the one hundred dollars on this amount of property will yield $600,000. This, together with the tax of four cents on the one hundred dollars referred to above, would amount to $680,000 and would absorb that amount of treasury warrants if the tax was collected in them, and this amount might be still increased by the occupation tax.

In this connection the tax imposed upon the sale of liquors should be fully considered. It is said that the law now in force in regard to the tax upon the sale of ardent spirits is evaded and disregarded almost universally, and that it neither prohibits the distillation of grain into ardent spirits nor does it yield the revenue that might be expected to the treasury. If such be the fact with regard to this law, it accomplishes no good as it now stands upon the statute books. If it prohibited the distillation of grain, it should remain as it now exists. If, however, the distillation and sale of ardent spirits cannot be prevented, they should be made to pay a heavy tax and might thus be made important in absorbing the State paper. This would still diminish the ad valorem tax necessary to the absorption of the warrants that might be issued should this plan be adopted. Should this plan be adopted, it will be necessary to guard against too heavy a tax upon them at first and the collection of it at too early a period in order to avoid oppression thereby.

Were this plan adopted, and if these estimates and calculations be reliable, the collection of taxes in Confederate money might, for the present, be suspended and the people burdened only with a very light tax on account of the State.

To complete this system and to place the credit of the State on a proper basis provision should be made for funding in bonds all the outstanding treasury warrants or for absorbing them in some other

way. These bonds might be made to mature at such periods
264 as you might — best for the interest of the State, to draw interest at 6 per cent. from date, but the interest not to be paid until the conclusion of the war. The policy of receiving them in liquidation of railroad bonds and interest thereon might well be considered.

Military authorities of this department have frequently requested that military prisoners who have been condemned to hard labor during the war should be received as laborers into the penitentiary. There was no authority or law for granting this request, and I therefore declined to do so. I did not consider it impolitic, however, that prisoners condemned to labor for a sufficient length of time to make them useful should be received in the penitentiary to supply the places of the convicts whose term of service in that institution might expire. The superintendent, influenced by these considerations, but without authority from me, has received into that institution quite a number of such prisoners, and represents that they make good laborers. I suggest that the authority of law be given for receiving and confining to the penitentiary as laborers such numbers of these prisoners as may be useful in the institution, and no more.

I again call your attention to the consideration and propriety of extending to the financial agent and the directory the authority to increase the capacity of the institution by the purchase and introduction of 1,300 additional spindles, which they represent could be usefully and profitably employed.

The assessment and collection of taxes is said to be very imperfectly performed, and that the State treasury, in consequence of this, suffers greatly. Whether this failure results from the inefficiency of the laws relating to assessors and collectors or from their failure to perform their duties under the laws is a matter that should engage your serious attention. It is but just that all property should be assessed and the taxes paid thereon according to the pro-
265 visions of the law. If the assessors and collectors are in fault, penalties should be provided which will insure the performance of duty on their part. The amount of specie, for instance, rendered on the assessment-rolls for 1864 is $1,595,134, and the specie tax paid on the sale of merchandise up to the 31st of May amounts only to $812.36. This certainly falls far short of the amount of specie that is supposed generally to exist in the State, and the amount of merchandise sold for it. According to the general impression as to the amount of specie in the State there should be derived from the two sources above named a sufficient amount to pay the interest on the State bonds. Whether these impressions are correct or at fault I know not. If they be correct, the failure lies in the assessment and collection of the tax.

The subject is of sufficient importance to claim your full attention and, if remedies can be provided for the evil, they should be provided. I do not know that any measure short of a thorough change of the laws on that subject will accomplish the result.

I respectfully invite your attention again to the subject of the

military board. The duty of procuring specie to pay the interest on the State bonds to procure arms and munitions of war for the frontier organization could, with more propriety, be devolved upon the board and the means placed at their disposal for these purposes which are now placed at the disposal of the executive, and, besides, the duties now devolved upon the board require more means than is provided for them and a larger discretion in the purchase of cotton through the medium of which a loan, the object proposed by existing laws, can be accomplished. It is not believed that proper efforts to accomplish these objects could cease with justice to the State or to the people in the present condition of things. To accomplish these objects with certainty the board should be empowered to purchase cotton partly with specie and partly with bonds, and in this way, notwithstanding the change in regulations with regard to the cotton trade by judicious management, the bonds that may be employed can be realized to the State at par in specie
266 or its equivalent. I do not commend a large trade on the part of the State in cotton, but a trade commensurate only with the absolute necessities of the State and the people. The necessity for cotton and wool cards still exists, and the purchase and introduction of them should still be continued, and when sold they should be sold to the counties for the benefit of the needy at the cost of the State.

And it might well be considered whether medicines might not be introduced to be disposed of in the same way by the board. There are representations coming to me from every portion of the State that there is great suffering in consequence of the want of medicines, and that they cannot be procured without the aid of the State in a direct or indirect way.

I on a previous occasion called your attention to the consideration of the propriety of declaring subject to military duty to the State all those not liable to duty to the Confederate States and under the age of sixty. If deemed unnecessary to organize such a force in the respective counties at the present time, provision might be made for organizing them when the necessity should become apparent. When such a necessity may present itself cannot be foreseen, and yet prudence dictates that we should be prepared for any emergency that may present itself. God is with us in this fearful struggle, and if true to ourselves we cannot fail of success.

P. MURRAH.

To correct statements in records offered in evidence in which the payment of $6,670.00 was stated to have been made on March 30, 1864, in "State money," plaintiff next introduced in evidence copies of deposit warrants certified to by the comptroller of public accounts under his seal of office as follows:

267 No. 907. *Duplicate Warrant.* $6,670.00.

The treasurer of the State of Texas will receive from Houston & Texas Central Railroad Company—

In Confederate notes..... ..... $
In State warrants..... 6,670.00
In specie .....
——— $6,670.00

Making the sum of sixty-six hundred and seventy dollars, and credit to account of school fund for bal. interest on bonds to Mar. 1, '61, and on acc. of 1862.

C. R. JOHNS,
Comptroller.

Comptroller's office, Austin, March 30th, 1864.

Endorsed.

TREASURER'S OFFICE,
AUSTIN, TEXAS, *March* 30, 1864.

Received of H. & T. C. R. R. Co. on account of interest due on the bonds of the company the within-specified sum.

C. R. RANDOLPH, *Treasurer.*

This was offered to show that "State money" meant State warrants, the deposit warrant being the paper on which the original entry was made.

No. 908. *Duplicate Warrant.* $15,009.92.

The treasurer of the State of Texas will receive from Houston & Texas Central Railroad Company—

In Confederate notes..... $
In State warrants..... 15,009.92
In specie .....
——— $15,009.92

Making the sum of fifteen thousand & nine $\frac{92}{100}$ dollars, and credit to account of school fund acc. of int. on bonds to 1st Mar., 1862.

268 JAS. W. HOWARD,
Ch'f Cl'k & Act'g Comptroller.

Comptroller's office, Austin, April 19th, 1864.

Endorsed.

TREASURER'S OFFICE,
AUSTIN, *April 19th*, 1864.

Received of W. J. Hutchins, pres't, on account of int. on railroad bonds, the within-specified sum.

C. H. RANDOLPH, *Treasurer.*

No. 909. *Duplicate Warrant.* $4,000.00.

The treasurer of the State of Texas will receive from Houston & Texas Central R'l R'd Co.—

In Confederate notes..... ..... $
In State warrants..... 4,000.00
In specie .....
——— $4,000.00

Making the sum of four thousand dollars, and credit on account of school fund acc. of interest on bonds to Mar. 1st, 1862.

JAS. W. HOWARD,
Ch'f Cl'k & Act'g Comptroller.

Comptroller's office, Austin, April 19th, 1864.

Endorsed.

TREASURER'S OFFICE,
AUSTIN, *April 19th*, 1864.

Received of W. J. Hutchins, pres't, on account of int. on railroad bonds the within-specified sum.

C. H. RANDOLPH, *Treasurer.*

269 EXECUTIVE DEPARTMENT,
COMPTROLLER'S OFFICE, AUSTIN, TEX., *Feb'y 1st*, 1896.

I, R. W. Finley, comptroller of public accounts in and for the State of Texas, do hereby certify that the foregoing attached three pages contain true and perfect copies of duplicate deposit warrants Nos. 907, 908, and 909, for the following amounts respectively: # 907, for $6,670.00; No. 908, for $15,009.92, and No. 909, for $4,000.00, issued to the Houston & Texas Central Railroad Company for account of interest on bonds held by the school fund on the respective dates as follows: No. 907, March 30th, 1864; No. 908, April 19th, 1864, and No. 909, April 19th, 1864, together with the endorsements thereon as the same remain on file in this office.

In testimony whereof I have hereunto signed my name and caused the impress of the seal of the comptroller's office to be affixed the day and date in this certificate first above written.

[SEAL.] R. W. FINLEY,
Comptroller.

The plaintiff next introduced in evidence, over the objections of the defendant, direct interrogatories Nos. 10 and 11 propounded to and the answers thereto by E. W. CAVE, whose depositions were taken on behalf of the plaintiff, and also offered the treasury warrant attached as an exhibit to said deposition and as a part of said answers; which interrogatories, answers, and exhibit are as follows:

Int. 10. Have you any of these warrants now in your possession, to you accessible? If so, please attach a substantial copy of one or more of them of the smallest denomination you have to your answer

hereto. If you know where they are, but have none at hand, kindly take time enough to examine same and procure a copy, or, if not a copy, give a description of them covering the following points: Dates of said warrants, the denomination thereof; when payable, if not payable on demand.

In answer to Int. #10 the witness says: I have never seen any of the treasury warrants which were paid by the Houston &
270 Texas Central Railway Company to the State of Texas on account of the indebtedness due the State of Texas by reason of the lending if the special school fund by the State, nor are they in my possession or accessible to me. As I have said in my answer to previous interrogatories, I am without knowledge of the kind or character of warrants used by the Houston & Texas Central Railway Company in making the payments referred to. I suppose that those warrants so paid were retained by the treasurer of the State of Texas. As it does not seem reasonable to suppose that I would have in my possession the State treasury warrants that were actually paid into the treasury of the State of Texas by the Houston & Texas Central Railway Company, I am at some doubt as to what warrants are referred to. It is proper I should say there came into my custody, after I became treasurer of the Houston & Texas Central Railway Company, some old Texas State treasury warrants issued by the State of Texas during the period inquired about. I attach one of these State treasury warrants of the smallest denomination, marked on the back in red ink "A," as part of my answer to this int'y, being treasury warrant # 8550 for $1.00, payable to "R. A. Reeves or bearer," issued of date "Austin, Apr'l 4, 1862;" but I am altogether without knowledge whether this State treasury warrant hereto attached is of the same character as those paid into the treasury of the State of Texas by the Houston & Texas Central Railway Company on account of indebtedness due the special school fund.

Int. # 11. Did you at any time see any of the treasury warrants delivered to the State of Texas by any railroad company or which had been so delivered in payment of an indebtedness due the special school fund? If you did, by what road? What were the amounts and denominations of the warrants so delivered?

Answer to Int. # 11 as follows:

I did not at any time see such warrants delivered to the State of Texas or which had been so delivered in payment of an indebtedness due the special school fund.

271 EXHIBIT "A" ATTACHED IN PART ANSWER TO INT. #10, SUPRA.

Treasury Warrant. One. I.

Receivable for

No. 8550. Appropriation 9 P.

Under act of Feb. 11, 1860, for civil service, the treasurer of the State of Texas will pay one dollar to R. A. Reeves or bearer.

Comptroller's office, Austin, Ap'l 4, 1862.

C. R. JOHNS,
Comptroller.

H. H. Haynes.

State dues.

Endorsed on the back: "A." C. H. Randolph, Tr. F. B.

(To the above questions and answers of the witness Cave and to the exhibit accompanying same counsel for defendant objected in so far as the same was offered as evidence to show the kind and character of warrants used in making the payments in question, as shown by bill of exception # 18.)

The plaintiff next introduced W. C. MCCALL as a witness, who, after being duly sworn, testified in effect that he was employed in the comptroller's department and had been so employed about eighteen months, and that he had been, at the instance of the attorney general, assigned by the comptroller, together with G. A. Proctor, to the duty of searching for evidence of the character of the warrants in which the payments in question were made; that he had been unable to find any data or memoranda of any kind showing the kind or character of warrants used in making such payments; that there was a large number of old warrants, purporting to have
272 been issued during the war, in the basement of the comptroller's office without any endorsement or writing on them to indicate and he was unable to find any data or memoranda to indicate by whom or for what purpose or on what account such warrants were received or from whom they were received; that he had not examined all the warrants in the basement, but, at the request of the attorney general, representing the plaintiff in this case, had taken from the lot a number, which he then produced and identified as those taken by him from the basement of the comptroller's office shortly before the trial.

I took them out of a batch just as I came to them. I made no effort to select any particular kind of warrants.

The State then offered in evidence the warrants about which the witness testified and which he identified.

Counsel for the State saying that same were offered to show the character of the warrants issued during the war, and that they were suitable in size, shape, and denomination for use as money, and show that many of them were issued in aid of the rebellion, as well

as to be circulated as money. The attorney general further stated that he wished the record to show that many warrants similar to those offered were then in the basement of the capitol, in the custody of the comptroller, and that he was willing for counsel for the defendant to have free access to them for *that* purpose of examination, as they doubtless have heretofore examined same. He said, "I cannot undertake to bring them all here; it would be too laborious. At the same time I do not wish it to appear that I am selecting certain warrants to offer in evidence without offering to the other side facilities to get such as they may wish to introduce."

Thereupon, over the objections of the defendant, as shown by bill of exceptions No. 19, in connection with said witness' testimony, counsel for plaintiff introduced in evidence the treasury warrants produced by said witness, as follows:

26 warrants issued at various dates during the year 1863 for the sum of $100 each, payable to various persons therein named
273 or bearer, of which number of warrants 13 were for military service and 13 were for civil service.

2 warrants issued at various dates during the year 1862 for the sum of $50 each, payable to various persons therein named or bearer, both of which warrants were issued for military services.

3 warrants issued at various times during the year 1863 for the sum of $50 each, payable to various persons therein named or bearer, two of which purport to have been issued for civil services and one for military services.

One warrant issued during the year 1863 for the sum of $30, payable to a person therein named or bearer and which purports to have been issued for civil services.

59 warrants issued at various dates during the years 1862 and 1863 for the sum of $20 each, payable to persons therein named or bearer, of which number of warrants 34 purport to have been issued for civil services and 25 to have been issued for military services.

27 warrants issued during the year 1863, on various days, for the sum of $3.00 each, payable to various persons named therein or bearer, of which 23 purport to have been issued for military services and 4 for civil services.

9 warrants issued at various dates during the year 1862 for the sum of $1.00 each, payable to the various persons therein named or bearer, of which 4 purport to have been issued for civil services and 5 for military services.

While all of the above warrants were issued during the war, twelve of those issued for military services were issued to cover appropriations made by acts passed in 1860, and two of those for civil services were issued under appropriations made in 1860.

In form and general appearance all of said warrants so introduced that were issued for civil services were substantially as follows, varying only in name of payee, date, amount, appropriations acts under which issued, to wit:

274

TWENTY. | Registered: W. S. HOTCHKISS. C. H. RANDOLPH.

20. TREASURY WARRANT. XX.

Receivable for public dues—fundable in eight per cent. bonds.

No. 1734. Appropriation 80 Q.

Under act of Jan. 8, 1862, for civil service, the treasurer of the State of Texas will pay to F. R. Lubbock or bearer twenty dollars.

Comptroller's office, Austin, Nov. 11, 1862.

C. R. JOHNS, *Comptroller.*

[The above warrant cancelled.]

And those for military services (varying likewise) were as follows, to wit:

FIVE. | Registered: H. WINKEL.

TREASURY WARRANT. V.

No. 49288. Appropriation 79 Q.

[Vignette.]

Under act of Jan. 4, 1862, for military service, the treasurer of the State of Texas will pay five dollars to city of Galveston or bearer.

FIVE.

Receivable for State dues.

Comptroller's office, Austin, May 9, 1862.

C. R. JOHNS, *Comptroller.*

[The above warrant cancelled.]

One-half of the warrants offered in evidence will be sent up with the record of this case and as a part thereof for the inspection of the appellate courts, in pursuance of an order made by the district court which tried this case.

On cross-examination, the witness stated that he did not examine all the cancelled warrants in the basement of the comptroller's office; that he didn't know whether the warrants in the basement were all the warrants that were cancelled during the war or not, and that there was nothing there, as far as he knew, to show from what source the warrants introduced in evidence were received by the comptroller and treasurer.

275 The plaintiff next introduced in evidence G. A. PROCTOR, who, after being duly sworn, testified in effect:

That he was employed in the comptroller's office and had been so employed for five or six years; that the old treasury warrants are kept in the basement of the comptroller's office—that is, the warrants issued during the war and some issued since the war. There are a great many cancelled warrants in the basement, but he does not

know how many; that he does not know whether all the warrants cancelled during the war are in the basement or not; that there is nothing on the warrants to indicate when they were cancelled nor when paid. A deposit warrant is a direction from the comptroller to the treasurer to receive a certain amount from a certain person, and a deposit warrant should show that the treasurer received it. That is the custom now; I do not know what it was during the war.

This witness testified in substance also as the witness McCall as to the manner of selecting the warrants offered in evidence.

Among other things, he said: I brought some of the warrants with me offered in evidence. I took them out of a lot in the basement, just as I came to them. They were bundled up then just as they are now; they have been there a long time. In some instances the wrappers have come off them.

In connection with the testimony of this witness counsel for plaintiff read a certified copy of one of the deposit warrants introduced as hereinbefore set forth as follows:

907. *Deposit Warrant.* 6670.

The treasurer of the State of Texas will receive from the Houston & Texas Central Railway Company—

In Confederate notes..... .... $
In State warrants..... ..... 6,670.00
In specie..... ....
——— $6,670.00

Making the sum of six thousand six hundred and seventy dollars, and credit to account of school fund for balance interest on bonds March 1st, 1861, and on account 1862.

C. R. JOHNS,
Comptroller.

Comptroller's office, Austin, March 30, 1864.

276 Proceeding, the said witness testified that a deposit warrant for the payments in question do not indicate the numbers and dates of the warrants used in making such payments; that the entries in the books are made from the deposit warrants, and that he does not know of any evidence in the comptroller's department giving dates or character of warrants used in making the payments in question, the only data from which the entries in the books were made being the deposit warrants.

The said witness further testified that he, with W. C. McCall, had been, at the instance of the attorney general, assigned by the comptroller to the duty of searching for evidence of the character of the warrants in which the payments in question were made; that he had been unable to find any data and memoranda of any kind showing the kind or character of warrants in making such payments; that there were a large number of old warrants purporting to have been issued during the war in the basement of the comp-

troller's office without any indorsements or writing on them to indicate by whom or for what purpose or on what account such warrants were received or from whom they were received; and said witness, proceeding, testified substantially to the same facts as was testified to by W. C. McCall above set forth.

Thereupon, in connection with the said witness's testimony, counsel for plaintiff introduced in evidence, over the objections of the defendant, as shown by bill of exception # 20, the cancelled warrants so taken by the witness from the basement of the comptroller's office as follows:

100 warrants issued at various dates during the year 1862 for the sum of $5.00 each, payable to various persons therein named or bearer, of which 75 purport to have been issued for military services and 25 for civil services.

In form and general appearance all of said warrants so in-
277 troduced that were issued for civil services were substantially as follows, varying only in name of payee, date, amount, and appropriations acts under which issued, to wit:

Receivable for

[Vignette.]

State dues.

Registered: H. WINKEL.

20. [Vignette.]

TREASURY WARRANT.

No. 42520. Appropriation 79 Q.

Under act of Jan. 4, 1862, for military service, the treasurer of the State of Texas will pay twenty dollars to M. Kennedy or bearer.

TWENTY DOLLARS.

Comptroller's office, Austin, Ap'l 30, 1862.

C. R. JOHNS, *Comptroller.*

[The above warrant canceled.]

And those for military services (varying likewise) were as follows, to wit:

FIVE.

[Vignette.]

Receivable for State dues.

Registered: H. WINKEL.

TREASURY WARRANT. V.

No. 96423. Appropriation 82 Q.

Under act of Jan. 14, 1862, for military service, the treasurer of the State of Texas will pay five dollars to I. P. Dumas or bearer.

FIVE.

Comptroller's office, Austin, July 29, 1862.

C. R. JOHNS, *Comptroller.*

[The above warrant canceled.]

One-half of the warrants offered in evidence will be sent up with the record in this case, and as a part thereof, for the inspection of the appellate courts in pursuance of an order made by the district court which tried this case.

On cross examination the witness testified that he did not examine all the warrants in the basement of the capitol; that he does not know whether the warrants now in the basement are all the
278 warrants cancelled during the war or not; that he does not know the mode or method of handling warrants during the war; that the warrants produced by him are similar to others in the basement, as far as his examination extended of them. He didn't examine them all.

Plaintiff next introduced W. B. WORTHAM, who, after being duly sworn, testified in effect that he was treasurer of the State of Texas, and had been for five years, and was clerk and book-keeper in the treasurer's office for 12 or 13 years prior to his election as treasurer; that he had made some examination of the old books in his office, at the request of counsel for plaintiff, for evidence of the date, denomination, and character of the warrants in which the payments in question were made, but learned nothing and knew nothing of the number of the warrants, or the dates or kinds of warrants, that were used in making such payments; that there is nothing upon the cancelled warrants to indicate by whom they were paid in; that he does not know anything about the method of doing business in 1863 and 1864 in the treasurer's office. A deposit warrant shows how much is received and from whom and to whose account it should go. When one wishes to pay money into the treasury, he gets a deposit warrant from the comptroller, made in triplicate. The original the comptroller keeps, the duplicate goes to the treasurer, and the triplicate to the person making the deposit.

Plaintiff next introduced JAS. P. HART, who, after being duly sworn, testified substantially as follows:

That he resided in Austin since 1865; that he remembers the burning of the old capitol; it was some time in 1878. The entire building, except the walls, was destroyed. The State departments were thereupon located in the temporary capitol until the new capitol was finished, about 1887 or 1888; that he knew C. H.
279 Randolph and C. R. Johns, former treasurer and comptroller, respectively. Both are dead. He knew Morgan C. Hamilton, a former comptroller. He also is dead. He knew Gov. Murrah, and understood he was dead. He knew Geo. C. Rives, former comptroller, but does not know whether he is living or not. He also knew Gov. A. J. Hamilton and Gov. E. J. Davis. Both are now dead. Ex-Gov. Throckmorton also died 2 or 3 years ago.

On cross-examination the witness testified that Ex-Comptroller Johns died about ten years ago; that Morgan C. Hamilton died in 1895; that Ex-Treasurer Randolph died some time in 1889 or 1890; that Ex-Gov. Throckmorton died about 2 years

ago; that Ex-Gov. Davis died about 1885. There were vaults in the old capitol in the treasurer's and comptroller's office. A great many records were preserved from the burning of the old capitol.

It is agreed that Ex-Gov. E. M. Pease is dead, and that he died subsequent to 1880, and prior to the institution of this suit.

Defendant's Evidence in Rebuttal.

R. S. LOVETT, a witness for defendant, testified in effect that his firm were general attorneys for the defendant company.

The witness testified that he had been specially charged by his associates with the preparation of this case for trial; that he had called upon the treasurer and comptroller of the State of Texas for information respecting the character, date, and denomination of warrants used in making the payments in controversy, and asked for copies of any records of their respective departments giving such information, but that he was informed by said comptroller and treasurer that they were without such information, and it was not disclosed by any records of their departments; that he made diligent effort to find some official or employé of defendant or person
280 having knowledge of the kind and character of warrants used in making such payments, but that he had been able to find no such person, and no such person who was connected with defendant at the time such payments were made.

(Part of the evidence of this witness offered by defendant was excluded, as is shown by bill of exceptions No. 2.)

The defendant next introduced GEO. KIDD, who, being duly sworn, testified:

That he was auditor of the Houston & Texas Central Railroad Company, the defendant, and as such had charge of its books and papers and was familiar with them; that he had made diligent search of the books and the records of defendant company to ascertain whether there was anything therein to show the date, character, or denomination of the warrants used in making the payments in question, and that he had found nothing whatever in reference thereto.

On cross-examination he testified that the books showed the fact, dates, and amount of payments in warrants, but not the kind, character, or denomination of the warrants.

He also testified on cross-examination that he did not know who was auditor of the Houston & Texas Central Railway Company when such payments were made; that the witness had been auditor of defendant company a little over one year and had succeeded his brother, who now resides in Houston, in that position. H. Hall was auditor before his brother held the position, and witness thinks he filled it as far back as 1867 or 1868. He is now dead. Witness does not know of any one now living who was connected with the Houston & Texas Central Railway Company at the time said payments were made.

On redirect examination witness testified that he had been employed in the auditor's office since 1885 and was 2 or 3 years general book-keeper.

281 On recross-examination he stated that his duties rarely required him to go back to the books of 1864 and 1865, and that his work had more to do with current business than with the past.

Defendant next introduced in evidence the depositions of E. W. CAVE, taken by the plaintiff, but of which the plaintiff offered only direct interrogatories 10 & 11 and the answers thereto above set forth, the testimony of said witness by deposition being in full as follows, except interrogatories 10 & 11 and the answers thereto and Exhibit "A" thereto, as hereinbefore set forth :

My name is E. W. Cave. I am an adult citizen of the State of Texas, residing in Houston, Harris county, Texas. I am in railway service.

I entered the civil service of the State of Texas in 1859, residing then at Austin, Texas. In 1861 I removed from Austin to Galveston, Texas, and engaged in the newspaper, printing, and publishing business, being also an editor. About 1862 I removed to Houston, Texas (where I have since had my residence), and continued the printing and publishing business, having disconnected myself with newspaper publication and editing. During the latter part of 1864 and until the fall of 1865 I was out of the State of Texas. I was also during a considerable part of the war in or connected with the military service of the Confederate States. After the close of the war my business connection was extended to embrace the book, stationery, and notion business. About 1870 I went out of that business and became identified with the development of the tide-water communications of the city of Houston, Texas, and with which I am still identified. About 1875 I became connected with the railway interests in Texas and am still connected with them.

I became treasurer of the Houston & Texas Central Railway Company in March, 1877. I continued as such until receivers were appointed for that company in 1885. I was appointed treasurer of the receivers and continued as such during the receivership. I have been secretary and treasurer of the Houston & Texas Central

282 Railroad Company since April, 1893, having previously been treasurer of said company since September, 1889.

I do not know, of my own knowledge, whether or not the Houston & Texas Central Railway Company acquired or held any treasury warrants issued by authority of the State of Texas from and including 1862 and up to and including 1865. I had no connection with the Houston & Texas Central Railway Company in the time stated, including 1862 and up to and including 1865.

I have no knowledge of the kind or character of warrants used by the Houston & Texas Central Railway Company in making the payments in treasury warrants on account of its indebtedness to the school-fund loan during the war.

I cannot give the market value of the treasury warrants issued by

the State of Texas during the war, nor can I state as to their market value on a basis of specie coined by the United States of America. People of the State of Texas were involved in a war with the Government of the United States, and my recollection is that the specie money coined by the United States practically ceased to be in circulation among the people of Texas soon after the war commenced. After some time, in some of the towns near the coast, specie, mainly of Mexican and Spanish coinage and foreign exchange (except on points in the United States), could be had; also in the trading towns of Texas on the Mexican border. I cannot state what the value of the Texas State treasury warrants was on a basis of such specie or foreign exchange. According to my recollection the exchangeable value of State treasury warrants with such specie or foreign exchange at the points where specie was a factor in business did not furnish any index of the value of the State treasury warrants in the interior of Texas, where there was little or no specie, and business was not conducted on that basis.

I have no knowledge as to the kinds of warrants used by the Houston & Texas Central Railway Company in making the
283 payments in question. I had no connection with that company at that time or with the treasury department of the State of Texas.

(For the answers of the witness to direct interrogatories 9 and 10, see the testimony of plaintiff in rebuttal.)

In answer to the cross-interrogatories the witness testified that he was at one time secretary of state of the State of Texas; was secretary of state during the administration of Governor Sam. Houston, who was inauguarted in December, 1859.

(The answer of the witness to cross-interrogatory No. 2 was, upon the objection of plaintiff, excluded by the court, as shown by defendant's bill of exceptions No. 21.)

The witness further testified in answer to cross-interrogatories that he did not know when or for what purpose the treasury warrants issued by the State of Texas and paid in by the Houston & Texas Central Railway Company, the Washington County Railroad Company, or the Buffalo ——, Brazos & Colorado Railroad Company on account of their indebtedness to the State were issued; that he was not employed by or connected with any railway company at the time such payments were made; that he had never seen any of the warrants used by any railway companies in making the payments in question, and knows nothing of his own knowledge about the date of the warrants so paid in or the purpose for which they were issued.

The defendant next introduced in evidence a copy of the entry in a journal of the comptroller's department in August, 1883, certified to under the hand and official seal of the comptroller of public accounts, showing the payments to the school fund of the principal and interest on the bonds executed by the treasurer and the comptroller to the school fund for the amount of warrants used in making the payments involved in this suit, as follows, to wit:

284 333, Journal G.

COMPTROLLER'S OFFICE, AUSTIN, TEXAS, *Aug.* —, 1883.

Sunds.

71. To land sales, act July 14, 1879.

6.	Permanent school fund ac., am't transferred to school fund	
	Permanent school fund ac., to pay principal of bonds heretofore known as bonds of "doubtful validity," as provided for by act approv'd Feb. —, 1883, pages 15, 16, Gen'l Laws of 1883	320,367.13
4.	Available school fund ac., being amount transferred to that account to pay interest on above 320,367.13 to August 1, 1883, as per above act of Feb. 23, '83.	111,414.45
20.	Permanent university fund ac., amount transferred to that account under the provisions of the above act of Feb. 23, 1883, to pay the principal of bonds belonging to university fund, heretofore styled as of "doubtful validity," amount transferred under above act of Feb. 23, '83, to pay comptroller's certificate of debt....	200,867.94 10,300.41
22.	Available university fund ac., amount transferred to that account to pay the interest on the university bonds, as provided for in sec. 2 of the act of Feb. 23, 1883.....	45,104.22

COMPTROLLER'S OFFICE, AUSTIN, TEXAS.

I, R. W. Finley, comptroller of public accounts in and for the State of Texas, do hereby certify that the above is a true copy of the records of this department as stated therein.

In witness whereof I hereunto set my hand and seal of office this the 31st day of Jan., A. D. 1896.

(Signed) R. W. FINLEY,
[SEAL.] *Comptroller of Public Acc'ts.*

285 It is agreed by and between plaintiff and defendant that the above and foregoing is a true and correct statement of the facts given in evidence on the trial of said cause, and they now sign the same as such by their respective attorneys of record.

M. M. CRANE, *Att'y for Pl'ff.*
BAKER, BOTTS, BAKER & LOVETT,
Att'ys for Def't.

Examined and approved in open court this the 31st day of March, 1896.

F. G. MORRIS,
Dist. Judge, Presiding.

(Endorsed:) 11916. The State of Texas *v.* H. & T. C. R. R. Co. Statement of facts. Filed March 31, 1896. Jas. P. Hart, clerk.

Appeal Bond.

Filed March 17th, 1896.

In the Fifty-third Judicial District Court in and for Travis County, Texas.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

Whereas in the above numbered and entitled cause, pending in the fifty third judicial district court in and for Travis county,
286 Texas, and at a regular term of said court, to wit, on the 29th day of February, 1896, The State of Texas, plaintiff in said cause, recovered a judgment against The Houston & Texas Central Railroad Company, defendant in said cause, which said judgment is substantially as follows, to wit:

"FEBRUARY 29TH, 1896.

The above-styled cause coming on to be heard, both parties appeared, by their attorneys, and announced ready for trial, but no jury being demanded, all questions of fact, as well as of law, were submitted to the court.

Then came on to be heard the defendant's demurrer to plaintiff's supplemental petition, and after hearing the same the court considered that they ought all be overruled, which was accordingly done; to which ruling the defendant then and there excepted.

Then came on to be heard plaintiff's exceptions to the defendant's supplemental answer. The court is of the opinion that the law is against said demurrers, and they are accordingly overruled; to which ruling plaintiff excepted.

The court then, after hearing the evidence and argument of counsel, considered that all of the material allegations in plaintiff's original petition had been fully proven.

It is therefore ordered, adjudged, and decreed by the court that the plaintiff, The State of Texas, do have and recover of and from the Houston & Texas Central Railroad Company the sum of six hundred and seventy-three thousand one hundred nine and $\frac{56}{100}$ ($673,109.56) (the same being the amount of principal and interest now due), together with all costs of suit.

It being made to appear to the court that the said indebtedness was secured by a lien upon all of defendant's railroad property as described in said plaintiff's original petition, it is therefore ordered, adjudged, and decreed by the court that the said lien be, and the same is hereby, foreclosed on all of its line of railroad as de-
287 scribed in said petition—that is to say, on its line of railroad beginning at the original terminus of said road on the left bank of Buffalo bayou, in the city of Houston, in Harris county, Texas, and running thence in a general northwesterly direction through the counties of Harris, Waller, Grimes, Brazos, Robertson

Falls, and Limestone, to a point about three miles south of Kosse in Limestone county, including six sections of said road and also the road formerly known as the Washington County railroad now known as the Western branch of the Houston & Texas Central Railroad Company, as follows: Beginning at a point of junction of said Western branch with the track of the main line of the Houston & Texas Central railroad in the town of Hempstead, in Waller county, thence in a general westerly direction through Waller and Washington counties about twenty-one and ¼ miles to a point in Brenham, in Washington county; and upon all of the charter rights of said defendant company, including the road-bed, right of way, grading, bridges, iron, equipments, and masonry, and all stock subscribed for in said company or companies, and upon all depots and depot stations and all of the property owned by said company or companies as necessary for their business—that is to say, on all of the defendant's railroad property from its terminus at Houston, through the various counties of the State, to its northern terminus in Denison, Grayson county, Texas, and on its Western branch to its northwestern terminus at Austin, Travis county, Texas, including all of the road-bed, right of way, grades, bridges, iron rails, equipments, and masonry, and all depots and depot stations therein; and the clerk is hereby commanded to issue an order of sale directed to the sheriff or any constable or Travis county, Texas, commanding him to sell the above described property, or so much thereof as may be necessary for the satisfaction of the judgment rendered in this case, and to issue an order of sale directed to the sheriff or any constable of any other county in Texas upon application of plaintiff's counsel, directing
288 all the property hereinbefore described to be sold, or so much thereof as may be sufficient for the satisfaction of the judgment rendered in this case; and in the event said property does not sell for enough to satisfy same, then that an execution may be issued in favor of the plaintiff, The State of Texas, for the balance remaining unpaid.

It is further ordered that execution issue in favor of the officers of the court against the defendant for all costs herein incurred, for which they may have their execution.

To which judgment and to the judge's conclusion of law and fact the defendant excepted and in open court gave notice of appeal to the court of civil appeals."

From which judgment the said Houston & Texas Central Railroad Company has taken an appeal and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, The Houston & Texas Central Railroad Company, as principal, and C. P. Huntington, Thos. H. Hubbard, Wm. D. Cleveland, Sam. Allen, and C. Lombardi, as sureties, acknowledge ourselves bound to pay to The State of Texas, plaintiff in said cause, the sum of one million five hundred thousand dollars ($1,500,000.00), conditioned that said Houston & Texas Central Railroad Company shall prosecute its appeal with effect, and in case the judgment of the supreme court or the court of civil appeals shall be against it, it shall perform its judgment, sentence,

or decree and pay all such damages as said court may award against it.

Witness our hands this 7th day of March, A. D. 1896.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY,
By BAKER, BOTTS, BAKER & LOVETT,
Its Attorneys.

C. P. HUNTINGTON.
THOS. H. HUBBARD.
WM. D. CLEVELAND.
SAM. ALLEN.
C. LOMBARDI.

289 THE STATE OF TEXAS, }
County of Harris. }

I, J. R. Waties, clerk of the district court in and for said county, do hereby certify that C. P. Huntington, Thos. H. Hubbard, Wm. D. Cleveland, Sam. Allen, and C. Lombardi, whose names appear signed to the annexed bond, are, in my opinion, good and ample security for the amount specified, and that if said bond was offered me for approval the same would be accepted and approved.

Witness my hand and seal of office at Houston, Texas, this 16th day of March, 1896.

[SEAL.]

J. R. WATIES,
C. D. C., Harris Co., Texas.

Approved March 17th, 1896.

JAS. P. HART,
Clerk of the District Court, Travis Co., Texas.

(Endorsed:) No. 11915. State of Texas *vs.* Houston & Texas Central Railroad Company. Appeal bond. Filed March 17th, 1896. Jas. P. Hart, clerk dist. ct. Travis Co., Texas.

Assignments of Error.

Filed May 7th, 1896.

In Travis County District Court, Fifty-third Judicial District.

THE STATE OF TEXAS
vs.
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY. } No. 11915.

290 Now comes The Houston and Texas Central Railroad Company, defendant in the above styled and numbered cause, and on its appeal to the court of civil appeals from the judgment herein rendered against it assigns the following errors committed by this court, to wit:

First.

The court erred in overruling and denying defendant's application to remove this cause into the circuit court of the United States

in and for the western district of Texas, as shown by defendant's bill of exceptions No. 1.

Second.

The court erred in overruling defendant's general demurrer to plaintiff's original petition herein.

Third.

The court erred in overruling defendant's II demurrer as contained in its first supplemental answer to the first special plea contained in plaintiff's first amended supplemental petition and to so much of said supplemental petition as alleged in effect that the treasury warrants therein referred to were void because issued in violation of the provision of the constitution of the State of Texas prohibiting the issuance of treasury warrants intended to circulate as money, and were bills of credit emitted by the State in contravention of the provisions of section X, article 1, of the Constitution of the United States, which demurrer was upon the ground that if said warrants were issued in violation of the constitution of Texas and of the United States, as alleged, it appeared from said supplemental petition that they were so issued by plaintiff and by it put in circulation among its citizens, and having been so issued and put in circulation, and after having contracted and agreed with defendant to receive the same as such payment, plaintiff, The State of Texas, accepted and received the treasury warrants so paid
291 in without protest or objection, and the transaction having been completed many years ago, and being fully executed, plaintiff, being the wrong-doer, if there was wrong, and *in pari delicto*, was not entitled to have the same reopened and set aside in order that it might take advantage of its own wrong, and was estopped to question or deny the validity of the transaction in this action instituted in its own behalf, and having received and accepted said warrants as such payment without protest or objection, it could not now repudiate its action.

Fourth.

The court erred in overruling defendant's III demurrer as contained in its first supplemental answer to the second special plea contained in plaintiff's first amended supplemental petition and to so much of said supplemental petition as alleged in effect that defendant should not be allowed credit for payments made in treasury warrants, and that such treasury warrants were illegal, because it was alleged that they were issued in aid of the rebellion, which demurrer was upon the ground substantially that if the warrants used in making the payments in question were issued in aid of the so-called rebellion, as alleged, it appeared from said supplemental petition that they were issued by plaintiff and by it put in circulation among its citizens, and having been so issued and put in circulation, and after having contracted and agreed with defendant to receive the same as such payment, plaintiff, The State of Texas,

accepted and received the treasury warrants so paid in without protest or objection, and the transaction having been completed many years ago, and being fully executed, plaintiff, being the wrong-doer, if there was wrong, and *in pari delicto*, was not entitled to have the same reopened and set aside in order that it might take advantage of its own wrong, and was estopped to question or deny the validity of the transaction in this action instituted in its own behalf, and having received and accepted said warrants as such payment without protest or objection, it could not now repudiate its action.

292 Fifth.

The court erred in overruling defendant's demurrer IV, as contained in its first supplemental answer to the last special plea, contained in said first amended supplemental petition, and to so much of said supplemental petition as alleges in effect that the said treasury warrants at the time such payments were made were practically worthless and without market value, and that such payments were repudiated by the officers of the State soon after the war; which demurrer was upon the ground substantially that the market or other value of such warrants was immaterial and irrelevant to any issue in the case; that the State could not legally complain of having paid the face value of its indebtedness, and that the time when it was alleged said payments were sought to be repudiated by the officers of the State was long after such payments had been made and the transaction completed and fully executed.

Sixth.

The court erred in excluding the testimony of defendant's witness, R. S. Lovett, offered to show the efforts made by defendant's counsel to ascertain the date, denomination, and character of warrants used in making the payments in question, as shown by defendant's bill of exceptions No. 2.

Seventh.

The court erred in admitting, over the objections of defendant, the testimony of plaintiff's witness, F. R. Lubbock, respecting the market value during the years 1863 and 1864 of treasury warrants issued by the State of Texas and the price for which witness sold the warrants issued to him, as shown by defendant's bill of exceptions No. 3.

Eighth.

The court erred in admitting, over the objections of defendant, the message of Governor E. J. Davis to the twelfth legislature, dated August 6th, 1870, vetoing the act for the relief of the Houston
293 & Texas Central Railway Company, as shown by defendant's bill of exception No. 4.

Ninth.

The court erred in admitting, over the objections of defendant, extracts from the message- of Governor Lubbock to the legislature dated November 15th, 1861, February 5th, 1863, and November 5th, 1863, and from the messages of Governor Murrah dated May 11th, 1864, and October 20th, 1864, relating to the financial condition of the State at those dates and to the existence, value, and use of treasury warrants; which were objected to by defendant upon the ground substantially (1) that the same were irrelevant, (2) that the purpose and intent of the legislature could not be thus shown, (3) that such evidence was inadmissible to show the meaning of such laws, (4) that said messages were not evidence of the facts therein stated, and (5) that it had not been shown that the warrants used in making the payments in question were of the same character as those referred to in said message-, all as shown by defendant's bills of exceptions Nos. 5, 6, 7, 9, and 10, presenting separately the same objections and question.

Tenth.

The court erred in admitting, over the objection of defendant, certificate of R. W. Finley, comptroller of public accounts of the State of Texas, setting forth copies of certain entries therein specified as contained in the books of his department, showing the charging of certain eight per cent. State bonds to the military board during the years 1862, 1863, and 1865, and other entries in reference to such bonds during said years, as shown by defendant's bill of exceptions No. 11.

Eleventh.

The court erred in admitting, over the objections of defendant, copy of a statement headed "The State of Texas school fund in account with C. H. Randolph, treasurer, for the two months ending the 31st day of December, 1864," certified to by R. W. Finley, comptroller of public accounts, and W. B. Wortham, treasurer of the State of Texas, as shown by defendant's bill of exceptions No. 12.

294 Twelfth.

The court erred in admitting, over the objections of defendant, copy of a statement headed "The State of Texas school fund in account with C. H. Randolph, treasurer, for the two months ending the 28th day of February, 1865," certified to by R. W. Finley, comptroller of public accounts, and W. B. Wortham, treasurer of the State of Texas, as shown by defendant's bill of exceptions No. 13.

Thirteenth.

The court erred in admitting, over the objections of defendant, a copy of a statement headed "The State of Texas school fund in account with C. H. Randolph, treasurer, for the quarter ending on the 31st day of May, 1865," certified to by R. W. Finley, comptroller of

public accounts, and W. B. Wortham, treasurer of the State of Texas, as shown by defendant's bill of exceptions No. 14.

Fourteenth.

The court erred in admitting, over the objections of defendant, copy of a statement headed "Statement of treasurer's receipts from revenue and other sources during the months of January and February, 1865," certified to by R. W. Finley, comptroller of public accounts, and W. B. Wortham, treasurer of the State of Texas, as shown by defendant's bill of exceptions No. 15.

Fifteenth.

The court erred in admitting, over the objections of defendant, copy of the statement headed "Statement of treasurer's receipts from revenue and other sources during the month of April, 1865," certified to by R. W. Finley, comptroller of public accounts, and W. B. Wortham, treasurer of the State of Texas, as shown by defendant's bill of exceptions No. 16.

Sixteenth.

295 The court erred in admitting, over the objections of defendant, an extract from the recommendations of C. R. Johns, former comptroller of the State of Texas, in his annual report as comptroller of public accounts, in November, 1861, as shown by defendant's bill of exceptions No. 17.

Seventeenth.

The court erred in admitting, over the objections of defendant, the treasury warrant attached as an exhibit to the depositions of E. W. Cave, in so far as same was offered as evidence to show the kind and character of warrants used in making the payments in question, as shown by defendant's bill of exceptions No. 18.

Eighteenth.

The court erred in admitting, over the objection of defendant, the treasury warrants taken from the basement of the comptroller's office and introduced in evidence in connection with the testimony of plaintiff's witness, W. C. McCall, as shown by defendant's bill of exceptions No. 19.

Nineteenth.

The court erred in admitting, over the objection of defendant, the treasury warrants taken from the basement of the comptroller's office and introduced in evidence in connection with the testimony of plaintiff's witness, G. A. Proctor, as shown by defendant's bill of exceptions No. 20.

Twentieth.

The court erred in excluding, upon the objection of plaintiff, cross-interrogatory No. 2 propounded to and the answer thereto by E. W.

Cave, whose depositions were taken by plaintiff, as shown by defendant's bill of exceptions No. 21.

Twenty-first.

The court erred in its finding and conclusion that all the allegations of fact contained in plaintiff's original petition are true as
296 therein stated, for there was not due and unpaid on the bonds of the Houston & Texas Central Railway Co. described in said petition on the first day of May, 1870, principal and interest, the sum of $657,324.35, as alleged in said petition, but only the sum of $551,550.00 was so due and unpaid on said date, and in finding that on said bonds of the Washington County Railroad Company there was on May 1st, 1870, $103,840.01, when only $48,497.17 was so due, being the balances after allowing defendant the credit for the amounts theretofore paid by said companies, as pleaded in its first amended answer, including the amounts paid in treasury warrants, and there was not due plaintiff at the time of the filing of said petition the several amounts therein alleged to be then so due, because all of said indebtedness had been theretofore fully paid off and discharged.

Twenty-second.

The court erred in finding and concluding as a fact that neither the State nor the railroad companies discriminated as to the class of warrants received by said companies for carrying services or used in making the payments in question, and that some of all kinds were used in making the payments, because there is no evidence to support such finding and conclusion, and no evidence that said railroad received or used in making such payments other than legal and valid warrants.

Twenty-third.

The court erred in finding as a fact that the payments made in treasury warrants on the indebtedness in question were charged off the account, and the account of the State *that* defendant was restated May 1st, 1870, so as to ignore the said payments in treasury warrants, because there is no evidence whatever to sustain or support such finding, but the uncontradicted evidence shows that said account and said indebtedness, as it stood on the
297 books of the State on May 1st, 1870, recognized and allowed defendant full credit for said payments in treasury warrants, and that if the same were ever charged off by the State or the accounts restated so as to ignore the same, it was subsequent to May 1st, 1870.

Twenty-fourth.

The court erred in finding that it was not proved that the governor was threatening to sell defendant's railroad to force the repayment of the amounts paid in treasury warrants, or whether he would have resorted to a suit to enforce such payments, because it

was not disputed and the evidence abundantly established the fact.

Twenty-fifth.

The court erred in finding and holding that by the act approved January 11th, 1862, the time for paying the interest and sinking fund maturing on the loans declared on in plaintiff's petition was extended until six months after the close of the war, and that for that reason the payments in question made in treasury warrants were made before the same were due and when no payment on account of said indebtedness was required to be made, because said act of January 11th, 1862, only extended the time for making such payments until the first day of January, 1864, or until six months after the termination of the war, if it should terminate before said date.

Twenty-sixth.

The court erred in finding and concluding that the acts of the legislature of the State of Texas authorizing the payments in question to be made in treasury warrants were passed in aid of the rebellion, and were for that reason void, because there was no evidence whatever to support and the evidence is insufficient to sustain the finding that the acts or either of them were passed in aid of the rebellion, and there was nothing upon the face of said acts indicating that they were passed for any such purpose.

298 Twenty-seventh.

The court erred in finding and concluding that the acts of the legislature of the State of Texas authorizing the payments in question in treasury warrants were passed in aid of legislation intended to cause State treasury warrants to be issued to circulate as money and with a view of stimulating their circulation as money, and were for that reason void, because there was no evidence whatever to support and the evidence is insufficient to sustain such finding, and there was nothing upon the face of said acts indicating that they were passed for any such purpose.

Twenty-eighth.

The court erred in finding and concluding that the companies under which defendant claims, by receiving treasury warrants of the State of Texas at par in order to be entitled to use them in making the payments in question, were aiding the rebellion, and were also, in so doing, supporting the circulation of treasury warrants issued to circulate as money in violation of the constitution of the State and of the United States, and that for such reason defendant acquired no right thereby to use treasury warrants in making such payments, and that the State officers had no authority to accept such payments, and that they were void, because there is no evidence to support and the evidence fails to sustain such findings.

Twenty-ninth.

The court erred in concluding and holding, as matter of law, that no presumption could arise or exist that the officers of the State of Texas accepting the payments in question, made in treasury warrants, accepted only such warrants as were issued in aid of the civil government.

Thirtieth.

299 The court erred in concluding and holding, as matter of law, that the burden of the proof was upon defendant to plead and prove the particular kind and character of warrants used in making the payments in question, or that defendant was required to do more than plead and prove the payment in such treasury warrants as were acceptable to and were, in fact, accepted by the comptroller of the State of Texas, who was by law authorized to receive the same as such payments.

Thirty-first.

The court erred in concluding and holding, as matter of law, that the burden of proof was on defendant to show that the treasury warrants used in making such payments were legal and valid, or to show more than the fact that the warrants used in making such payments were accepted by the officers authorized to receive the same.

Thirty-second.

The court erred in finding and concluding that the legislature of the State of Texas and all officers of said State were acting outside of their authority to represent the State, and that they alone, and not the State of Texas, were *in pari delicto* in authorizing and receiving such payments and in subsequently ratifying the same.

Thirty-third.

The court erred in holding that the payments in question did not constitute an executed matter upon the ground that nothing was executed or accomplished by said payments, but that they were void and did not amount to payments in law, and that they were not received by the State as payments, but were received by the State's officers, because there is no evidence to support and the evidence is insufficient to sustain such finding, and the same is erroneous.

Thirty-fourth.

300 The court erred, as matter of law, in holding that the legislature of the State of Texas had no power in 1870 to validate the said payments and did not validate them.

Thirty-fifth.

The court erred in rendering judgment against defendant for the sum of $673,109.56, as principal and interest to the date of the

judgment, which is more than the amount claimed in plaintiff's petition, and when, according to plaintiff's pleadings and the undisputed evidence, plaintiff, if entitled to recover at all, was in no event entitled to recover more than $645,467.27.

Thirty-sixth.

The court erred in rendering judgment against this defendant for the amount found by the court to be due plaintiff on account of the loans declared on in plaintiff's petition because it is not alleged in plaintiff's petition, nor is it shown by any evidence, that this defendant ever assumed or promised to pay or in any manner became liable and bound for said indebtedness, or for any part thereof, and said judgment is therefore without any pleadings or evidence to support it.

Thirty-seventh.

The court erred in rendering judgment establishing and foreclosing a lien upon all defendant's line of railway extending from the city of Houston, Harris county, to the town of Denison, Grayson county, with a branch line extending from Hempstead, Waller county, to Austin, Travis county, and upon its corporate rights and franchises and upon all of its other property to satisfy the amount decreed by the court to be due the plaintiff, when plaintiff's petition does not claim any lien, and no lien in fact or law exists or ever existed upon any of said property, except that part of defendant's line of railroad extending from the left bank of Buffalo
301 bayou, in the said city of Houston, in a northwesterly direction through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, and Limestone, to a point about three miles south of Kosse, in Limestone county, a distance of about 150 miles, and on that part of the Austin branch of defendant's railway extending from the junction thereof with defendant's main track in the town of Hempstead in a westerly direction through Waller and Washington counties, a distance of about 21¼ miles, to a point in the town of Brenham, in said Washington county.

Thirty-eighth.

The court erred in rendering judgment against defendant at all without first or at the same time rendering judgment against the Houston & Texas Central Railway Company and the Washington County Railroad Company, who contracted the indebtedness declared on and by whom alone, if by any one, it was due, and when no evidence was offered to show that the said Houston & Texas Central Railway Company was defunct, or that its corporate existence had ceased or that it had no directors who became and are trustees for its creditors and stockholders upon the sale of its corporate rights, franchises, and property.

Thirty-ninth.

The court erred in finding and holding as matter of law that the entire amount of the indebtedness claimed by plaintiff against defendant, and which the court found to exist, was due on the ground that defendant had been in default for more than ten days in making payments of interest and sinking fund thereon, whereas, if said indebtedness exists and defendant is in default thereon, it appears that such default is due to the *bona fide* and reasonable belief and contention upon defendant's part that it had paid off and satisfied said indebtedness in full by the payments in question.

302 Fortieth.

The court erred in denying defendant credit for and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that the laws authorizing such payments to be made in treasury warrants were passed in aid of the rebellion and for that reason were void, when there was no evidence to support or sufficient to sustain such finding, and when there was nothing upon the face of said laws to indicate that they were passed for any such purpose or were for any reason invalid.

Forty-first.

The court erred in denying defendant credit for and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that such treasury warrants were issued in aid of the rebellion, and were for that reason illegal, when there was no evidence whatever to show that the warrants or any of them used in making such payments were other than legal and valid warrants issued before or during the war in the usual course of business on appropriations duly made for the support of the civil government of the State or for other lawful purposes, and when there was no evidence whatever to support or sustain said judgment.

Forty-second.

The court erred in denying defendant credit for and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that the laws authorizing such payments to be made in treasury warrants
303 were passed in aid of legislation intended to cause State treasury warrants to be issued to circulate as money, contrary to the constitution of the State, and as bills of credit, contrary to the Constitution of the United States, and for those reasons were void, when there was no evidence whatever to support or sufficient to sustain such findings and when there was nothing upon the face of

said laws to indicate that they were passed for any such purpose or were for any reason invalid.

Forty-third.

The court erred in denying defendant credit for and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that such treasury warrants were issued with the intention that they should circulate as money, contrary to the constitution of the State, and as bills of credit, contrary to the Constitution of the United States, and were for those reasons illegal, when there was no evidence to support or sustain such finding and judgment or to show that any of the warrants were other than legal and valid warrants drawn by the comptroller in the usual course of business upon the treasurer of the State to pay appropriations theretofore duly made by the legislature of the State for the support of the State government, by which means alone money could be lawfully drawn from the treasury of the State.

Forty-fourth.

The court erred in rendering judgment against defendant when the undisputed evidence showed that the indebtedness declared on in plaintiff's petition had been fully paid off and satisfied upon the ground that the payments thereon shown to have been made in State treasury warrants were invalid, or that defendant was not entitled to credit therefor, when it appeared from the undisputed evi-
dence that if the treasury warrants used in making such
304 payments were issued in aid of the rebellion or were issued to
circulate as money, contrary to the constitution of the State, or were bills of credit emitted contrary to the Constitution of the United States, they were so issued by the State of Texas and were by it accepted without protest or objection and willingly as valid and lawful payments, and the transaction was fully executed, and that the State of Texas was *in pari delicto* if there was wrong in the transaction.

Forty-fifth.

The court erred in finding and holding that defendant was not entitled to credit for the amount shown to have been paid on account of the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant, when at the time such payments were made there were valid laws of the State of Texas in force authorizing such payments to be made in such treasury warrants on the condition, in effect, that the comptroller should be satisfied that the company making such payments had accepted such warrants at par with specie for freight and passenger fares upon its railroad, and when the undisputed evidence showed that the comptroller, being so satisfied, had accepted said warrants as such payments, and at the time gave due credit therefor, when there was no evidence whatever to show that the warrants

so used in making such payments were illegal or invalid or other than legal and valid warrants issued before or during the war in the usual course of business on appropriations duly made for the support of the civil government of the State, or for other lawful purposes, and when there was no evidence whatever of any illegality in the transaction with respect to the kind and character of warrants used or the action of the company in making such payments or otherwise, and when said payments were received and accepted without protest or objection at the time and were acknowledged to be and treated as valid by the government of the State of Texas at that time and frequently afterward, and when the transaction was and had been for a great number of years
305 fully executed and completed, and when it appeared that if said warrants were illegal or if there was any illegality whatever in the transaction plaintiff was the wrong-doer and was *in pari delicto* and was not entitled to relief against the same.

Forty-sixth.

The court erred in rendering judgment against defendant when the uncontradicted evidence showed that the indebtedness declared on in plaintiff's petition had been fully paid and satisfied and ceased to exist upon the ground that the payments on said indebtedness, made in treasury warrants, as shown by the evidence, were invalid, or that defendant was not entitled to credit therefor, when it appeared that at the time such payments were made there were valid laws of the State of Texas in force authorizing such payments in such warrants upon the conditions specified in such laws, which conditions the undisputed evidence showed were fully complied with.

Wherefore defendant prays that such judgment be reversed and rendered in defendant's favor.

J. P. BLAIR,
BAKER, BOTTS, BAKER & LOVETT,
Attorneys for H. & T. C. R. R. Co., Defendant.

(Endorsed:) No. 11915. The State of Texas *vs.* H. & T. C. R. R. Co. Assignments of error. Filed May 7th, 1896. Jas. P. Hart, clerk.

306 *Bill of Costs.*

THE STATE OF TEXAS
vs.
THE H. & T. C. R. R. Co. } No. 11915.

To officers of court, Dr.

Clerk's Fees.

	Dolls.	Cts
Docketing suit		20
Issuing citations and duplicates	3	00
" copy petition and certificate	4	20
Entering appearance		30
" continuance		60
" motions		60
" orders and decree	3	00
Issuing 3 subpœnas		75
" 4 additional names		60
Swearing 7 witnesses		70
Issuing copy int. and notice	2	70
" " " " commission	3	35
Taking bond	1	50
Filing 70 papers	10	50
Entering judgment	2	25
Assessing damages		50
Taxing cost		25
Transcript	224	25
Clerk's costs forward	$259	25

307 *Sheriff's Fees.*

	Dolls.	Cts.
R. E. White, citation & mileage	1	75
Sheriff of Harris Co., citation	1	60
R. E. White, subpœnas and mileage	3	60
Sheriff of Harris county, precept	1	00
Total sheriff's costs	$7	95

Miscellaneous Costs.

Depositions of E. W. Cave, taken by pl'ff	15	00

Recapitulation.

Miscellaneous costs	15	00
Clerk's costs	259	25
Sheriff's costs	7	95
Total	$282	20

308 *Clerk's Certificate.*

THE STATE OF TEXAS, }
County of Travis. }

I, Jas. P. Hart, clerk of the district court within and for the county and State aforesaid, do hereby certify that the within and foregoing 342 pages *is* a true and correct transcript of all the proceedings had in this court in cause No. 11915, of The State of Texas *vs.* The Houston & Texas Central Railroad Company, as the same appear now of record and on file in this office.

Given under my hand and seal of office, at office, in the city of Austin, Texas, this the 16 day of May, A. D. 1896.

[SEAL.] (Signed) JAS. P. HART,
Clerk District Court, Travis County, Texas.

(Endorsed:) No. 1714. The Houston & Texas Central Railroad Co., appellant, *vs.* The State of Texas, appellee. From the district court of Travis county, 53rd judicial district. Applied for by Baker, Botts, Baker & Lovett, attorneys for appellant, on the 16th day of May, A. D. 1896, and delivered to the above-named attorneys on the 16th day of May, A. D. 1896. Jas. P. Hart, clerk of the district court of Travis county. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, June 10, 1896. Will L. Vining, clerk.

309 *Order of Court of Civil Appeals.*

Made Febr'y 17th, 1897.

H. & T. C. R. R. Co. }
vs. } No. 1714.
STATE OF TEXAS. }

Appeal from Travis county.

Submitted upon briefs and oral arguments of both parties.

Opinion of the Court of Civil Appeals.

Filed June 9th, 1897.

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, }
Appellant, } No. 1714.
vs. }
THE STATE OF TEXAS, Appellee. }

Appeal from Travis county.

Statement of Case.

This suit was instituted by the State of Texas through its then attorney general, C. A. Culberson, in the district court of Travis county, on the 5th day December, 1894, praying judgment for balance

claimed to be due on part of the special school fund of the State of Texas. The petition states the case about as briefly as the points involved will justify. It is therefore substantially incorporated herein, omitting the formal parts.

" Plaintiff, The State of Texas, through her attorney general, C. A. Culberson, acting under direction of the governor, brings this suit against the Houston & Texas Central Railroad Company, and says:

1st. The said company is incorporated under the general laws of the State of Texas.

2nd. Its general office and principal place of business is at Houston, Texas.

310 3rd. Its line of railroad runs into and through the county of Travis, in the State of Texas.

4th. Its local agent at Austin, in said county, is H. D. Patrick.

5th. The State of Texas made loans, under the provisions of an act entitled 'An act to provide for the investment of the special school fund in the bonds of railroads incorporated by the State,' approved August 12th, 1856, to the Houston and Texas Central Railway Company as follows:

On April 18, 1857, one hundred and fifty thousand dollars;
On October 28, 1857, sixty thousand dollars;
On May 21, 1858, sixty thousand dollars;
On July 6th, 1858, thirty thousand dollars;
On February 23, 1859, thirty thousand dollars;
On June 15, 1859, thirty thousand dollars;
On July 22nd, 1859, thirty thousand dollars;
On August 2nd, 1859, thirty thousand dollars;
On August 20, 1859, thirty thousand dollars; and said company executed — delivered to the State of Texas, in consideration of said loans, bonds as follows:

One dated March 25, 1857, for one hundred and fifty thousand dollars;
One dated September 22, 1857, for sixty thousand dollars;
One dated January 28, 1858, for thirty thousand dollars;
One dated February 23, 1858, for thirty thousand dollars;
One dated February 23, 1858, for thirty thousand dollars;
One dated January 25, 1859, for thirty thousand dollars;
One dated May 14, 1859, for thirty thousand dollars;
One dated —— —, 1859, for thirty thousand dollars;
One dated June 2, 1859, for thirty thousand dollars;
One dated July 29, 1859, for thirty thousand dollars; said

311 bonds being to the effect that said company would pay to the State of Texas, at the office of its treasurer, in the city of Austin, ten years from the respective dates of said bonds, the said several sums of money; would pay each year two per cent. of said several sums as sinking fund, and would pay interest on each of them at the rate of six per cent. per annum, and said bonds expressly acknowledging the lien created by the act aforesaid to secure payment of loans made thereon.

By the loans aforesaid and by the execution of said bonds the said company became liable to pay, at the dates severally indi-

cated, the several sums of money (principal, interest, and sinking fund) mentioned, and the State, to secure payment of said sums, became thereby invested with the lien aforesaid.

6th. The State of Texas made under the provisions of the act aforesaid and of an act approved January 28th, 1856, a loan to the Washington County Railroad Company on June 29th, 1859, of sixty-six thousand dollars, and in consideration thereof the said company executed to the State its bond dated June 6th, 1859, to the effect that it would, ten years after the date thereof, pay to the State, at Austin, Texas, said sum, would pay annually two per cent. thereof as a sinking fund, and would pay interest thereon at the rate of six per cent. per annum, and acknowledging the lien created by the act aforesaid.

By the said loan and the bond aforesaid the said company promised and became liable to pay the same sum at the time indicated and the said sinking fund and interest, and the State became invested with the lien aforesaid.

7th. That on or before the 15th day of August, A. D. 1870, the Washington County railway became consolidated with and merged into the Houston & Texas Central railway, and said Houston & Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railway Company.

312 8th. That the bonds aforesaid were not paid according to their tenor and effect, and the property upon which the lien aforesaid attached became liable to sale.

9th. That prior to the 15th day of August, 1870, the Houston & Texas Central Railway Company had constructed on its main line railroad as follows: A line of railroad completely constructed, beginning at the original terminus of said road on the left bank of Buffalo bayou, in the city of Houston, in Harris county, Texas, and running thence, in a general northwesterly direction, through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, and Limestone, including the 1st, 2nd, 3rd, 4th, 5th, and 6th sections of twenty-five miles each, to a point one hundred and fifty miles *to* the place of beginning, about three miles south of Kosse, in Limestone county.

10th. That prior to the 15th day of August, 1870, the Washington County Railway Company and the Houston & Texas Central Railway Company had constructed of what is now known — the Western branch of the Houston & Texas Central railroad as follows: A line of railroad beginning at the point of junction of said Western branch with the track of the main line of the Houston & Texas Central railroad in the town of Hempstead, in Waller county, thence in a general westerly direction through Waller and Washington counties for about twenty-one and a quarter miles to a point in the town of Brenham, in Washington county.

11th. That under the terms of the said act of August 13th, 1856, and under the terms of the bonds aforesaid a lien to secure payment of the said bonds attached to all of said road, viz., said one hundred and fifty miles of the main line of the Houston & Texas Central

railway and twenty-one and a quarter miles of the Western branch thereof, and to all charter rights of said company or companies, including the road-bed, right of way, grading, bridges, iron rails,
313 equipments and masonry, and to all stock subscribed for in said company or companies, and upon all depots and depot stations, all the property owned by said company or companiss as necessary for their business.

12th. That on the 1st day of May, 1870, the aggregate amount due upon the bonds executed by the Houston & Texas Central Railway Company, principal and interest, was the sum of six hundred and fifty-seven thousand three hundred and twenty-four and $\frac{35}{100}$ths dollars ($657,324.35).

13th. That on the 1st day of May, 1870, the aggregate amount due upon the bonds executed by the Washington County Railway Company, principal and interest, was the sum of one hundred and three thousand eight hundred and forty and $\frac{1}{100}$th dollars ($103,840.01).

14th. That the Houston & Texas Central Railway Company accepted the terms of the said act of August 13th, 1870, entitled 'An act for the relief of railroad companies indebted to the State for loans from the school fund,' and thereby promised and became liable to pay, in addition to said sum of $657,324.35 and said sum of $103,840.01, semi-annually, on the 1st day of November and the 1st day of May of each year, six months' interest at six per cent. per annum on said aggregate amounts, and in addition thereto on said dates a sinking fund of one per cent. of said amounts, in consideration of which promises the State by the terms of said law agreed not to make sale of the property upon which its lien existed as long as said payments were made.

15th. That thereafter to May 1st, 1879, said semi-annual interest and sinking fund was paid by the Houston & Texas Central Railway Company upon said sum of $103,840.01, but that no payment of principal or interest was made on November 1st, 1879, nor within ten days thereafter, nor has any such payment been since made, and upon said failure to pay within ten days after the 1st day of November, A. D. 1879, the entire balance then remaining unpaid of said sum, amounting to $86,655.90, became at once due and payable.
314 16th. That up to and including the 1st day of May, 1893, the said semi-annual interest and one per cent. sinking fund was paid by said Houston & Texas Central Railway Company and defendant upon said sum of $657,324.35, but the next semi-annual interest and sinking fund was not paid, but the sum of $2,620 only was paid. The balance thereof was not paid nor has it or any part of it since been paid, and upon said failure to pay within ten days after the 1st day of November, A. D. 1893, the entire balance of $411,935.84 remaining then unpaid of said sum of $657,324.35 became at once due and payable.

17th. That upon said sum of $86,655.90 there has become due each six months from said 1st day of May, 1879, up to the present time semi-annual interest at the rate of six per cent. per annum, and there is due upon each of said installments of unpaid interest

interest from the date upon which they respectively became due at the rate up to July 1st, 1891, of eight per cent., and since then o six per cent.

18th. That upon said sum of $411,935.84 there has become due upon May 1st, 1894, semi-annual interest at the rate of six per cent per annum, and upon November 1, 1894, a like amount, and since those dates upon said unpaid installments of interest at six per cent.

19th. That upon the 1st day of July, A. D. 1886, all the property of the Houston & Texas Central Railway Company, including the property upon which the State has the lien aforesaid, was sold judicially, and the purchaser and his associates formed under the laws of this State the corporation herein styled defendant.

20th. That said Washington County and Houston & Texas Central Railway Companies are defunct; that their corporate existence has been terminated; that neither of them has a president, directors or other officers or stockholders or other representatives upon whom service may be had, and that there is no way of bringing said defunct corporations before this court.

315 21st. That the Houston & Texas Central Railroad Company, defendant, claimes as the legal owner (subject to the lien heretofore mentioned) and as in possession of all the property upon which the lien above set forth exists.

22nd. Plaintiff prays that judgment be given it that there is due upon the obligations aforesaid the sums of money heretofore stated with interest as set forth, and that payment thereof is secured by the liens on the property aforesaid; that said property be sold as under execution, and that the proceeds be applied to the payment of said sums, with interest, and for costs, and that it have other relief, including the appointment of a receiver, as in the premises should be given."

To this defendant answered on the 6th day of February, 1895 and on May 15th, 1895, filed its first amended original answer setting up the payment of certain amounts during the war between the States in State treasury warrants, in addition to certain large cash payments therein pleaded.

Among the payments pleaded were certain amounts paid during the year 1864 by the Houston & Texas Central Railway Company and during the year 1864 and on May 11, 1865, by the Washington County Railroad Company, in the treasury warrants of the State of Texas, as authorized by the act entitled "An act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due on their bonds," approved December 16, 1863 (General Laws 10th Legislature, page 37), and the act entitled "An act amending an act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due or hereafter become due on their bonds," approved May 28th, 1864 (General Laws 10th Legislature, Called Session, page 9), and the act entitled "An act to authorize railroad companies to discharge

their indebtedness to the special school fund with the treasury
316 warrants and bonds and coupons of the State," approved November 16, 1864 (General Laws 1864, Second Extra Session, page 43). Compliance with the conditions of these acts, necessary to entitle said companies to make such payments in warrants, was alleged in the answer, and it was claimed that by accepting said warrants at par with specie for freight and passenger fares, as required in said acts, the same had become a contract between the State and said company, and the latter had thereby acquired a vested right to the credits for such payments. It was also claimed by the appellant in said answer that said payments were made in good faith, at the instance and invitation of the State, and accepted by the State, through its duly authorized officers, without objection, as valid and lawful payments, and proper credit therefor was then and there given said railway companies by the proper officers upon the books of the State; that the validity of said payments and the right of said railway companies to credit therefor was recognized by all the State's officers at the time and for many years thereafter, and was disputed by no one, and was expressly recognized by the act entitled "An act for the relief of railroad companies indebted to the State for loans from the special school fund," approved August 13, 1870 (General Laws 1870, page 85), and by the act entitled "An act for the relief of the Houston & Texas Central Railway Company," passed August 15th, 1870 (Special Laws 1870, page 325), and acquiesced in by all the executive officers and by all departments of the State government until the latter part of the year 1870, when A. Bledsoe, then comptroller, with the concurrence and approval of E. J. Davis, then governor of Texas, wrongfully and unlawfully sought to deprive the said railway companies of the credit to which they were entitled on account of said payments and wrongfully sought to repudiate the same, and to that end, without authority of law, sought to recharge each of said railway companies upon the books of the comptroller's office with
the amounts which had been so paid by them in treasury war-
317 rants. It was alleged that after such action of said comptroller and in pursuance of their scheme the said E. J. Davis, as governor, threatened to proceed and was in fact proceeding to advertise and sell the railroad and property of each of said railway companies in the manner provided in the aforesaid acts of August 13, 1856, and of August 13, 1870, and avowed his purpose to sell the same unless each of said railway companies pay the amount claimed by said governor and comptroller to be due as interest and sinking fund on said indebtedness, disregarding and without allowing credit for the payments made in treasury warrants, and that, in order to avoid the sale of their railroad and property and the irreparable injury that would have resulted to each of them therefrom, the said railway companies were forced to pay said interest and sinking fund accordingly, which they did under protest, filing a written protest with the comptroller before and with each payment. It was alleged that like threats were thereafter made and duress and coercion exercised at the maturity of each installment of interest and sinking fund, as provided in the act of August 13, 1870, and such payments were

made in each instance under protest in writing and filed with the comptroller, as aforesaid. After continuing said payments until all of the indebtedness, allowing credit for the payments made in treasury warrants, had been paid off and discharged, said railway companies and appellant discontinued the same and refused thereafter to make further payments. The last payment on account of the indebtedness of the Washington County Railroad Company was made on May 1st, 1879, and on account of the indebtedness of the Houston & Texas Central Railway Company on May 1st, 1893, upon which dates it was claimed the indebtedness of said railway companies, respectively allowing credit for the payments made in warrants, was fully paid off and discharged.

On November 16th, 1895, appellee filed its first supplemental petition. This was subsequently amended on the 16th day of
318 January, 1896. The amended supplemental petition consisted of demurrers and appeal plea, setting up:

1. That the money borrowed by the railroad company constituted a part of the special school fund of the State of Texas which had been previously appropriated as a permanent fund for the support of the public free schools, and that to permit these payments in worthless warrants or in anything else than money would be a diversion of that school fund, and was therefore in contravention of sec. 2, art. X, of the constitution of 1845 and as amended in 1861.

2. That the treasury warrants so issued were issued for the purpose of being circulated as money, and that they were so circulated and used by the State officers; that they were therefore void because in contravention of sec. 8. art. VII, of the constitution of the State of Texas then in existence.

3. Because the said warrants so issued constituted bills of credit, within the meaning of section 10, article I, of the Constitution of the United States, and they were therefore void because said section of the Constitution prohibited their issuance by the States.

4. Because the acts of the legislature authorizing the issuance of said treasury warrants and the history of the times show that they were issued for the purpose of aiding the then authorities of the State of Texas in prosecuting a war and rebellion against the Government of the United States, and that they were issued for the purpose of aiding the State in prosecuting said war and rebellion.

5. Because the people in the constitutional convention assembled in 1866 by ordinance declared all warrants in which said pretended payments were made to be utterly void and of no effect, and, further, because article XII, section 36, of the constitution of 1869 reiterated and repeated the same declaration.

6. That said warrants in which said payments were made were utterly worthless.

319 7. That said payments had been disallowed in 1870 by the then officers of the State, of which defendant had ample notice.

Plaintiff prayed that no credit be allowed by reason of the payments in said warrants, and if allowed that they be allowed only to

the extent of the market value of said warrants when paid to the State.

In response to this additional pleading of the plaintiff, defendant filed its first supplemental answer excepting to plaintiff's pleadings in response to defendant's original answer upon various grounds which will be stated and noticed in detail under the assignments of error hereinafter presented and discussed, complaining of the action of the court in overruling such exceptions, and defendant also by said supplemental answer joined issue on all the allegations of the plaintiff's supplemental petition, and by way of special pleas denied that the treasury warrants used in making such payments were issued for the purpose of being circulated as money or in aid of the rebellion, but averred that they were issued in the exercise of the powers and performance of the duties conferred upon the comptroller by laws in force in the State of Texas ever since its annexation and in the ordinary transactions of the business of the government, and to pay appropriations duly made by the legislature for the ordinary and lawful expenses of the government, including salaries of legislative, judicial, and executive officers, but then in excess of the revenues for the time being of the State government and above the available funds in the State treasury; but defendant averred, however, that if it were true, as alleged by the plaintiff, that said warrants were issued in violation of the constitution of this State prohibiting the issuance of treasury warrants intended to circulate as money, or were bills of credit emitted by the State in violation of the Constitution of the United States, or were issued in aid of the rebellion, they were so issued by plaintiff, The State of Texas, and put in circulation by it among its citizens, who were induced,
320 if not coerced, by the State to accept the same; that after agreeing with said railway companies by the aforesaid acts of December 16, 1863, May 28, 1864, and November 16, 1864, to receive said warrants, under the terms and conditions in said acts specified, in payment of interest and sinking fund due on said indebtedness, the State did receive and accept said payments in treasury warrants without objection or protest and applied the same as payments upon the indebtedness sued on, giving due credit therefor at the time upon its books; that at the time of the passage of such acts and upon the date of such payments the State of Texas was in the full exercise and enjoyment of all its governmental powers, its laws were enforced throughout its territorial limits, and all persons therein were subject thereto, and that such payments were, when made, valid and binding and in accordance with the valid laws of the State then in force and uniformly observed and enforced throughout the limits of the State, and that any subsequent legislation or constitutional provision intended to invalidate such payments was contrary to the Constitution of the United States and therefore void. It was further averred, in effect, that the said warrants having been issued by the State and put in circulation by it, and said railway companies having been induced to accept the same as payment for freight and passenger fares, as provided in the

aforesaid acts, and the State of Texas having invited them to make such payments in warrants and having accepted said warrants at the time without protest or objection and having given due credit therefor, and the transaction having been completed and being fully executed, the State, being the wrong-doer if there was wrong, was not entitled to have said completed and executed transactions reopened and set aside and relief given it against its own wrong, and that if it be true, as alleged by the State, that said warrants were issued in aid of the rebellion or were issued with the intention that they should be circulated as money, or that they were bills of credit emitted by the State, then the State was *in pari delicto*
321 and was not entitled to reopen said executed transaction and set the same aside and secure relief against its own wrong.

On the 16th of November, 1895, defendant filed his application, accompanied by bond, for the removal of the cause in the circuit court of the United States for the western district of Texas, alleging in substance that the cause of action was one arising under the Constitution and laws of the United States. The application was denied.

All of the demurrers were overruled by the court, the case was tried, and resulted in a judgment for the plaintiff for the sum of $673,109.56, together with all costs of suit, and with a foreclosure of the lien mentioned in the petition upon all the property of the defendant.

Opinion.

We find that the bonds sued upon by the State were executed by the Houston & Texas Central railway and the Washington County railway, as alleged, and that the Central railway acquired all of the rights and property of the Washington County railway and took the property of that road subject to the liens asserted by the State. We find that the defendant made the payments pleaded in its answer, but that such payments as were made in State warrants were in treasury warrants intended by certain acts of the legislature of the State to circulate as money. We find that prior to August 13th, 1870, the Houston & Texas Central Railway Company's line of road extended from the left bank of Buffalo bayou, in the city of Houston, Texas, one hundred and fifty miles in a northwesterly direction through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, and Limestone, and that the Washington County railway extended twenty-one and a quarter miles from the town of Hempstead, in Waller county, to Brenham, in Washington county, and we also find that the amount due the State is the amount for which the judgment was rendered. In view of the disposition we make of the
322 case, these are all the facts we feel called upon to find. The first question that arises is whether the court erred in refusing to remove the cause to the Federal court, as requested by appellant. In view of the construction given to the law regulating the removal of causes from the State court to the Federal court by the case of Tennessee *vs.* Union & Planters' Bank, 152 U. S., 455, we must hold that the trial court did not err in denying the application to remove. The ground of removal insisted upon is that a Federal

question arises from the pleadings filed by the State. The original petition filed by the State was an ordinary action at law upon the bonds executed by the railway companies under statutes of this State which fixed and determined the liability of the obligers. No part of the Federal Constitution or any law of Congress were proper or necessary to be passed upon in order to grant the State the relief asked in the original petition. The remedy pursued by the State and the relief she asked were fully and adequately provided for by the statutes of this State. The obligations executed by the railway company upon which the suit was brought were to be construed by the rules of the common law and the statutes relating thereto. There are no provisions of the Federal Constitution or of the laws of Congress that had any bearing upon the liability of the appellant upon the bonds as originally sued upon. The defendant in its answer set up defensive matter in the nature of payment of the obligations executed by it; and the State, in response thereto, in its supplemental petition stated several reasons as showing that the alleged payments were void and illegal and were not binding upon the State, among which was one to the effect that such payments were made in State treasury warrants which were in the nature of bills of credit, and which the State by the terms of the Constitution of the United States was denied the authority to issue. The State was not in any of its pleadings seeking to set aside or cancel the payments made, but its contention was that no payments had
323 been made. If it had been necessary for the State to set aside or cancel these payments as impediments in the way of a recovery upon the bonds a different question would have been presented; but here the contention was broadly made that the railway company had not paid the obligations, or, in other words, that the pretended payments were never in law made; that they were void. Now, in the case cited it is held that in order for a Federal question to arise it must appear from the plaintiff's statement of his own cause of action; and it is there held, quoting the case of Gold Washing Co. *vs.* Keys, 96 U. S., 203, that "a cause cannot be removed from a State court simply because in the progress of litigation it may become necessary to give a construction to the Constitution or laws of the United States."

No removable question arises by reason of the fact that the State acquired the funds loaned to the railway company from the United States. The title of the State to that fund or its right therein were not issues in the case and were not questions which were raised or presented for decision.

The second and principal question which arises is whether the payments made by the railway companies in State treasury warrants are valid and binding upon the State. This question presents really the only controversy between the parties. Sec. 8, art. 7, of the constitution of 1845 states that in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money. The warrants which were paid upon the obligations due the State were issued

under acts of the legislature of the State when that provision of the constitution was in force.

The various acts of the legislature of the State during the period of the war concerning the State revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used and the amounts for which they could be issued, together with the size, shape, and color of the warrants issued and the small amount in which warrants
324 were issued, together with the history of the times and the well-known depleted condition of the State treasury during that period, together with the scarcity of an existing, reliable, and available circulating medium as money, convinces us that it was the purpose of various acts of the legislature during that time to give to the warrants issued during that period as much as possible a standing and character as money. The scarcity of money and the necessities of the State and the public were evidently inducements to the legislatures sitting during this period to provide uses to which warrants may be put in the way of requiring the State officers and authorizing railways to receive them in payment of debts due them. The evident purpose was in certain instances to give to the warrants a debt-paying power in order that they may be given an advanced value and could be used in some respects as money. When the warrants were issued it was not expected and intended that they would be immediately paid, for the State was not then in a financial condition to pay them, nor was the intention solely that they should serve the legal purposes of evidences of debts against the State, but the character of the legislation during the period of the war clearly indicates that the purpose was to give to these warrants the added quality of money, as far as it laid within the power of the legislature to accomplish that result. To set out all the acts of the legislatures bearing upon this subject, together with all of the facts which we have considered in connection therewith, with the well-known matters of history relating thereto, would unnecessarily prolong the opinion; therefore we close this branch of the case with the statement that, in our opinion, the warrants of the State issued during the period of the war after January 1st, 1862, were intended to be used and circulated as money, and in this connection it is well to say that we are of the opinion, from all that is shown by the record, together with various acts of the
325 legislatures during that time, that the payments made in warrants by the railway companies upon the obligations sued upon were in warrants issued after the time we have declared they were intended to circulate as money. What is said in this connection relieves us of passing upon the interesting questions presented in the briefs as to the burden of proof with reference to the alleged payments.

It is contended by appellant that if it should be held that the warrants in which the payments were made were illegal, that the State, through its officers, by authority of an act of the legislature having received the warrants as payments, the State was *in pari delicto* as to these payments; consequently she could not urge their

invalidity. The legislature, in the exercise of its functions like other members of the official family of the government, must confine its acts within the constitutional limits that circumscribe its powers, and when it performs acts in violation of an express command of the constitution no more validity and life can be given to such acts because of the fact that it may be one of the agents of the government highest in authority than would be given to acts of minor agents of the State.

The legislative department of the government, in the exercise of its high functions in creating laws to govern the conduct of other departments of the government, has no greater power by an unconstitutional law to bind the State than would be the case of an unauthorized or illegal act of an officer in some other branch of the public service. The doctrine of *in pari delicto* can have no application to the State in its sovereign capacity when the act out of which it springs is prohibited by the constitution. In such a case the act prohibited would be beyond the scope of the authority of any and all of the agents of the State from the highest and most exalted departments of the government to the lowest official who may represent it. If such was not the rule, the constitutional inhibition would in effect be a dead letter upon the books, for it
326 would permit parties who had pretended rights founded upon such illegal and prohibited acts to escape the effect of the offense denounced by the constitution whenever they reached the point that they had actually violated it by reaping the benefits of the unauthorized act. Such methods of indirect violation of the constitution should receive no more sanction than is the case when it has been expressly violated. These remarks also apply to whatever pretended rights that are asserted by appellant under the acts of the legislature of 1870. They had no power to cure the vice in the original contract of payments in warrants. If we would hold that the acts of 1870 were passed after the constitution of 1869 went into effect, we would also be required to hold that that constitution contained a similar provision as that of the constitution of 1845, which prohibited the legislature from authorizing warrants to be issued and circulated as money. Hence the rule that to some extent exists which authorizes the legislature to ratify a contract after the repeal of the law that prohibited it does not apply. The language of section 6, art. 12, of the constitution of 1869 upon this subject is identical with that of section 8, art. 7, of the constitution of 1845. The constitution of 1866 also contained a similar provision. There was no error committed by the court in its ruling upon the demurrers and in admitting the evidence complained of and in refusing to admit the evidence of witness Cave. This evidence, if it had been admitted, would not have led the trial court or this court to a different conclusion. According to calculation we find that the judgment was rendered for the proper amount. The court below rendered a personal judgment against appellant for the amount of the debt due the State by the Washington County railroad and by the Houston & Texas Central Railway Company and foreclosed the lien provided for in the acts of 1856 and the con-

tracts executed to the State by those two roads upon the entire line of road and appurtenances owned by the appellant. The
327 old Houston & Texas Central Railway Company when it acquired the assets and property of the old Washington County Railroad Company took it subject to the lien held by the State. Afterwards the Houston & Texas Central Railway Company was sold out and bought in by one Olcott, and the present company, known as The Houston & Texas Central Railroad Company, the appellant, was organized and created, and this last company acquired all of the road and appurtenances, &c., of the old Houston & Texas Central Railway Company and the Washington County Railroad Company, and under the law by which this present company was created and organized it took the property subject to the prior liens held by the State; but there is no provision of law or of its charter that makes the present company liable to a personal judgment against it for the debt due the State, and therefore the judgment rendered in this respect is erroneous; but the present company held the property subject to the lien of the State, and the State could foreclose that lien by a proceeding *in rem* against the property held by appellant, and as it held all of the property of the old roads and their corporate existence was extinct for the purpose of foreclosing this lien the appellant was the only party that was necessary to be made defendant; but, as contended by appellant, the court should not have foreclosed the lien upon all the road and its appurtenances, because the petition filed by the State claimed a lien upon that part of the road described in the findings of fact as extending one hundred and fifty miles in a northeasterly direction from the bank of Buffalo bayou, in the city of Houston, and twenty-one and one-half miles from the town of Hempstead to the town of Brenham, and, further, because this was the extent of the road completed on the 13th day of August, 1870, when the act of that date went into effect which provided that the liens held by the State should not attach to any extension of the road constructed after that time. The appellee contends that the legislature could not by this act affect or impair the lien held by
328 the State upon the entire road. If we could hold that the act of 1856, under which the liens were made and the contract executed, applied to roads subsequently constructed, we think, as the subject is one of contract between the State and the roads and as the funds thereby loaned the roads were not of the permanent school funds provided for in the constitution of 1845 and were under the control of the legislature, as held by the trial court, the State, through its legislature, and the railway companies could by agreement effect a change in the contract. The State, through its legislature, being a party to the contract, could by a subsequent act, with the consent of the roads, limit and restrict in part the operation of the liens as originally provided for in the act of 1856. Therefore this leads to the conclusion that the judgment below is erroneous in foreclosing the lien upon the entire road.

These errors in the judgment pointed out do not require us to reverse and remand the case, as from what appears in the record we can reform and affirm. Therefore the judgment as rendered below

is here reformed so as to render no personal judgment against the appellant and to only foreclose a lien upon that part of the road which the findings of fact shows was in existence on August 13th, 1870, together with all other property in connection therewith mentioned in the judgment below, such as depots, &c., together with the franchise of that part of said road. The cost of the case below is taxed against the appellant and the cost of this appeal against appellee. The judgment so reformed will be affirmed. Some other interesting questions were passed upon by the trial court, which, in view of the disposition of the questions ruled upon by us, need not be noticed. We desire to state that the able opinion of the trial court found in the record of this cause has been of much assistance to us in passing upon the questions considered.

FISHER,
Chief Justice.

329 (Endorsed:) With application No. 1628. No. 1714. The Houston & Texas Central R. R. Co., appellant, *vs.* The State of Texas, appellee. Appeal from Travis county. Opinion. Reformed and affirmed. Fisher, chief justice. Filed in court of civil appeals. 3rd supreme judicial district, Austin, Texas, June 9, 1897. R. H. Connerly, clerk. Filed in supreme court December 1, 1897. Chas. S. Morse, clerk.

Judgment of Court of Civil Appeals.

Rendered June 9th, 1897.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY *vs.* THE STATE OF TEXAS. } No. 1714.

Appeal from district court of Travis county.

Opinion by Chief Justice Fisher.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was no error in the judgment of the court below except in so far as it renders a personal judgment against appellant and fixes and forecloses a lien upon all of its road-bed and appurtenances, *and* this court, after considering all the facts in the record, together with the law relating thereto, concludes that the appellant, The Houston & Texas Central Railroad Company, took possession of the hereinafter-described property, subject to the lien herein foreclosed, and that said property in its hands is subject to said debt and lien held by the State of Texas. It is therefore considered, ordered, adjudged and decreed that the debt of the State of Texas is hereby established for the amount stated in the judgment of the court below, and that the old Houston & Texas Central Railway Company and the Washington County Railway Com-
330 pany are liable therefor and that the property formerly belonging to these two roads, now held by appellant, here-

after described, is subject to said debt and lien, but that the appellant is not liable to a personal judgment in favor of appellee; therefore be it further ordered and decreed that the judgment of the court below be so reformed as to foreclose the lien asserted by the State on the following-described property for the sum of six hundred and seventy-three thousand one hundred and nine and $\frac{56}{100}$ dollars, with interest from February 29th, 1896, and all costs of suit in the court *court* below, to wit, upon its line of railroad beginning at the original terminus of said road, on the left bank of Buffalo bayou, in the city of Houston, in Harris county, Texas, and running thence in a general northwesterly direction through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, and Limestone, including the 1st, 2d, 3rd, 4th, 5th, and 6-h sections of twenty-five miles each, to a point one hundred and fifty miles from the place of beginning, about three miles south of Kosse, in Limestone county, Texas, and upon its line of railroad as follows, beginning at the point of junction of its Western branch with the track of the main line of the Houston & Texas Central railroad in the town of Hempstead, in Waller county, Texas, thence in a general westerly direction through Waller and Washington counties, for about twenty-one and one-fourth miles, to a point in the town of Brenham, in Washington county, Texas, and upon the charter rights of said appellant company incident or appurtenant to said above-described two lines of railroad, including the road-bed, right of way, grading, bridges, iron, equipments and masonry, and all stock subscribed for in said companies upon said parts of said road, and upon all depots and depot stations, and all of the property owned by said company or companies necessary for their business, with all rights and franchises belonging to the parts of said road above described, and the
331 clerk of the court below is hereby commanded to issue an order of sale to the sheriff or any constable of Travis county, Texas, commanding him to sell said above-described property or so much thereof as may be necessary for the satisfaction of the judgment herein, with interest from date when originally entered in the court below, to wit, February 29th, 1896, but that no execution issue against appellant for any amount remaining due, should any remain due after said sale, that as thus reformed the judgment of the court below is affirmed, that the appellee, The State of Texas, pay all costs in this cause in this court expended and this decision be certified below for observance.

Motion for Rehearing in Court of Civil Appeals.

Filed June 23, 1897.

In the Court of Civil Appeals, Third Supreme Judicial District, at Austin.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, Appellant, *vs.* STATE OF TEXAS. } No. 1714.

Appeal from Travis county.

Now comes The Houston & Texas Central Railroad Company, appellant in the above-entitled cause, and moves this court to set aside the judgment rendered by this court on the 9th day of June, 1897, reforming and affirming the judgment of the court below in this cause, and grant appellant a rehearing herein for the reasons following, to wit:

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First.

This court erred in overruling and in not sustaining appellant's first assignment of error, reading as follows:

"The court erred in overruling and denying defendant's application to remove this cause into the circuit court of the United States for the western district of Texas, as shown by defendant's bill of exceptions No. 1."

Statement.

The above assignment is presented in Appellant's Brief, pages 19–24.

Second.

This court erred in overruling and in not sustaining appellant's second and thirty-eighth assignments of error, reading as follows:

Second. "The court erred in overruling defendant's general demurrer to plaintiff's original petition herein."

Thirty-eighth. "The court erred in rendering judgment against defendant at all without first or at the same time rendering judgment against the Houston and Texas Central Railway Company and the Washington County Railroad Company, who contracted the indebtedness declared on, and by whom alone, if by any one, it was due, and when no evidence was offered to show that the said Houston and Texas Central Railway Company was defunct, or that its corporate existence had ceased, or that it had any directors who had become and are trustees for its creditors and stockholders upon the sale of its corporate rights, franchises, and property."

Statement.

The above assignments of error are presented and discussed together in Appellant's Brief, pages 24–26.

Third.

The said court of civil appeals erred in overruling and in
333 not sustaining appellant's third and fourth assignments of error, reading as follows:

Third. "The court erred in overruling defendant's II demurrer, as contained in its first supplemental answer to the first special plea contained in plaintiff's first amended supplemental petition, and to so much of said supplemental petition as alleged in effect that the treasury warrants therein referred to were void because issued in violation of the provisions of the constitution of the State of Texas prohibiting the issuance of treasury warrants intended to circulate as money, and were bills of credit emitted by the State in contravention of the provisions of section 10, article 1, of the Constitution of the United States, which demurrer was upon the ground that if said warrants were issued in violation of the constitution of Texas and of the United States, as alleged, it appeared from said supplemental petition that they were so issued by plaintiff and by it put in circulation among its citizens, and having been so issued and put in circulation, and after having contracted and agreed with the defendant to receive the same as such payment, plaintiff, The State of Texas, accepted and received the treasury warrants so paid in without protest or objection, and the transaction having been completed many years ago and being fully executed, plaintiff, being the wrong-doer, if there was wrong, and *in pari delicto*, was not entitled to have the same reopened and set aside in order that it might take advantage of its own wrong, and was estopped to question or deny the validity of the transaction in this action instituted in its own behalf, and having received and accepted said warrants as such payment without protest or objection, it could not now repudiate its action."

Fourth. "The court erred in overruling defendant's III demurrer, as contained in its first supplemental answer to the second special plea contained in plaintiff's first amended supplemental peti-
334 tion, and to so much of said supplemental petition as alleged in effect that defendant should not be allowed credit for payments made in treasury warrants, and that such treasury warrants were illegal because it was alleged that they were issued in aid of the rebellion, which demurrer was upon the ground substantially that if the warrants used in making the payments in question were issued in aid of the so-called rebellion, as alleged, it appeared from said supplemental petition that they were issued by plaintiff and by it put in circulation among its citizens, and having been so issued and put in circulation, and after having contracted and agreed with defendant to receive the same as such payment, plaintiff, The State of Texas, accepted and received the treasury warrants so paid in without protest or objection, and the transaction having been completed many years ago and being fully executed, plaintiff, being the wrong-doer, if there was wrong, and *in pari delicto*, was not entitled to have the same reopened and set aside in order that it might take advantage of its own wrong, and was estopped to ques-

tion or deny the validity of the transaction in this action instituted in its own behalf, and having received and accepted said warrants as such payment without protest or objection, it could not now repudiate its action."

Statement.

The above assignments are presented and discussed together in Appellant's Brief, pages 26–33, and authorities sustaining the same are there cited. We also refer to the printed arguments on file in behalf of appellant for further discussion of the questions presented by these assignments.

Fourth.

This court erred in not considering and in not sustaining appellant's fifth assignment of error, reading as follows:

"The court erred in overruling defendant's IV demurrer,
335 as contained in its first supplemental answer to the last special plea contained in said first amended supplemental petition, and to so much of said supplemental petition as alleged in effect that the said treasury warrants at the time such payments were made were practically worthless and without market value, and that such payments were repudiated by the officers of the State soon after the war, which demurrer was upon the ground substantially that the market or other value of such warrants was immaterial and irrelevant to any issue in the case; that the State could not legally complain of having paid the face value of its indebtedness, and that the time when it was alleged said payments were sought to be repudiated by the officers of the State was long after such payments had been made and the transaction completed and fully executed."

Statement.

The above assignment is presented and discussed in Appellant's Brief, pages 34–36.

Fifth.

This court erred in not considering and in not sustaining appellant's seventh assignment of error, reading as follows:

"The court erred in admitting, over the objection of defendant, the testimony of plaintiff's witness, F. R. Lubbock, respecting the market value during the years 1863 and 1864 of treasury warrants issued by the State of Texas and the price for which witness sold the warrants issued to him, as shown by defendant's bill of exceptions No. 3."

Statement.

The above assignment is presented and discussed in Appellant's Brief, pages 36–38.

Sixth.

This court erred in not considering and in not sustaining appellant's eighth, ninth, and sixteenth assignments of error, reading as follows:

336 Eighth. "The court erred in admitting, over the objections of the defendant, the message of Governor E. J. Davis to the twelfth legislature, dated August 6-h, 1870, vetoing the act for the relief of the Houston and Texas Central Railway Company, as shown by defendant's bill of exceptions No. 4."

Ninth. "The court erred in admitting, over the objections of the defendant, extracts from the messages of Governor Lubbock to the legislature dated November 15th, 1861, February 5th, 1863, and November 5th, 1863, and from the messages of Governor Murrah dated May 11, 1864, and October 20th, 1864, relating to the financial condition of the State at those dates, and to the existence, value, and use of treasury warrants, which were objected to by the defendant upon the grounds substantially (1) that the same were irrelevant; (2) that the purpose and intent of the legislature could not be thus shown; (3) that such evidence was inadmissible to show the meaning of such laws; (4) that said messages were not evidence of the facts therein stated, and (5) that it had not been shown that the warrants used in making the payments in question were of the same character as those referred to in said messages, all as shown by defendant's bills of exceptions Nos. 5, 6, 7, 9, and 10, presenting separately the same objections and question."

Sixteenth. "The court erred in admitting, over the objections of defendant, an extract from the recommendations of C. R. Johns, former comptroller of the State of Texas, made in his annual report as comptroller of public accounts in November, 1861, as shown by defendant's bill of exceptions No. 17."

Statement.

The above assignments are presented and discussed together in Appellant's Brief, pages 38–41.

Seventh.

337 The court erred in not considering and in not sustaining appellant's tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments of error, reading as follows:

Tenth. "The court erred in admitting, over the objection of the defendant, certificate of R. W. Finley, comptroller of public accounts of the State of Texas, setting forth copies of certain entries therein specified as contained in the books of his department showing the charging of certain eight per cent. State bonds to the military board during the years 1862, 1863, and 1865 and other entries in reference to such bonds during said years, as shown by defendant's bill of exceptions No. 11."

Eleventh. "The court erred in admitting, over the objection of defendant, a copy of a statement headed 'The State of Texas school fund in account with C. H. Randolph, treasurer, for the two months ending the 31st day of December, 1864,' certified to by R. W. Finley, comptroller of public accounts, and W. B. Wortham, treasurer of the State of Texas, as shown by defendant's bill of exceptions No. 12."

Twelfth. "The court erred in admitting, over the objection of defendant, copy of a statement headed 'The State of Texas school fund in account with C. H. Randolph, treasurer, for the two months ending on the 28th day of February, 1865,' certified to by R. W. Finley, comptroller of public accounts, and W. B. Wortham, treasurer of the State of Texas, as shown by defendant's bill of exceptions No. 13."

Thirteenth. "The court erred in admitting, over the objection of defendant, a copy of a statement — 'The State of Texas school fund in account with C. H. Randolph, treasurer, for the quarter ending the 31st day of May, 1865,' certified to by R. W. Finley, comptroller of public accounts, and W. B. Wortham, treasurer of the State of Texas, as shown by defendant's bill of exceptions No. 14."

Fourteenth. The court erred in admitting, over the objection of defendant, copy of a statement headed 'Statement of treasurer's receipts from revenue and other sources during the months of January and February, 1865,' certified to by R. W. Finley,
338 comptroller of public accounts, and W. B. Wortham, treasurer of the State of Texas, as shown by defendant's bill of exceptions No. 15."

Fifteenth. "The court erred in admitting, over the objection of defendant, copy of a statement headed 'Statement of treasurer's receipts from revenue and other sources during the month of April, 1865,' certified to by R. W. Finley, comptroller of public accounts, and W. B. Wortham, treasurer of the State of *the State of* Texas, as shown by defendant's bill of exceptions No. 16."

Statement.

The above assignments are presented and discussed together in Appellant's Brief, pages 41–44.

Eighth.

The court erred in not considering and in not sustaining appellant's eighteenth and nineteenth assignments of error, reading as follows:

Eighteenth. "The court erred in admitting, over the objection of defendant, the treasury warrants taken from the basement of the comptroller's office and introduced in evidence in connection with the testimony of plaintiff's witness W. C. McCall, as shown by defendant's bill of exceptions No. 19."

Nineteenth. "The court erred in admitting, over the objection of defendant, the treasury warrants taken from the basement of the comptroller's office and introduced in evidence in connection with the testimony of plaintiff's witness G. A. Proctor, as shown by defendant's bill of exceptions No. 20."

Statement.

The above assignments are presented and discussed together in Appellant's Brief, pages 44–47.

Ninth.

This court erred in overruling and in not sustaining ap-
339 pellant's twentieth assignment of error, reading as follows:
"The court erred in excluding, upon the objection of plaintiff, cross-interrogatory No. 2 propounded to and the answer thereto by E. W. Cave, whose depositions were taken by the plaintiff, as shown by defendant's bill of exceptions No. 21."

Statement.

The above assignment is presented in Appellant's Brief, pages 47–50.

Tenth.

This court erred in overruling and in not sustaining appellant's twenty-first assignment of error, reading as follows:
"The court erred in its finding and conclusion that all the allegations of fact contained in plaintiff's original petition are true as therein stated, for there was not due and unpaid on the bonds of the Houston and Texas Central Railway Company described in said petition on the first day of May, 1870, principal and interest, the sum of $657,324.35, as alleged in said petition, but only the sum of $551,550.00 was so due and unpaid on said date, and in finding that on said bonds of the Washington County Railroad Company there was, on May 1st, 1870, $103,840.01, when only $48,497.17 was due, being the balances, after allowing defendant the credit for the amounts theretofore paid by said companies, as pleaded in its first amended answer, including the amounts paid in treasury warrants, and there was not due plaintiff at the time of the filing of said petition the several amounts therein alleged to be then so due, because all of said indebtedness had been theretofore fully paid off and discharged."

Statement.

The above assignment is presented and discussed in Appellant's Brief, pages 50, 51.

Eleventh.

This court erred in not considering and in not sustaining appellant's twenty-second assignment of error, reading as follows:
340 "The court erred in finding as a fact that neither the State nor the railroad companies discriminated as to the class of warrants received by said companies for carrying services or used in making the payments in question, and that some of all kinds were used in *in* making the payments, because there is no evidence to support such finding and conclusion and no evidence that said railroad received or used in making such payments other than legal and valid warrants."

Statement.

The above assignment is presented in Appellant's Brief, pages 51, 52.

Twelfth.

This court erred in overruling and in not sustaining appellant's twenty-third assignment of error, reading as follows:

"The court erred in finding as a fact that the payments made in treasury warrants on the indebtedness in question were charged off the account, and the account of the State with defendant was restated May 1st, 1870, so as to ignore the said payments in treasury warrants, because there is no evidence whatever to sustain or support such finding, but the uncontradicted evidence shows that said account and said indebtedness as it stood on the books of the State on May 1st, 1870, recognized and allowed defendant full credit for *for* said payment in treasury warrants, and that if the same was ever charged off by the State or the account restated so as to ignore the same it was subsequent to May 1st, 1870."

Statement.

The above assignment is presented in Appellant's Brief, pages 53, 54.

Thirteenth.

This court erred in not considering and in not sustaining appellant's twenty-fourth assignment of error, reading as follows:

"The court erred in finding that it was not proved that the
341 governor was threatening to sell defendant's railroad to force the repayment of the amounts paid in treasury warrants or whether he would have resorted to a suit to enforce such payments, because it was not disputed, and the evidence abundantly established the fact."

Statement.

The above assignment is presented in Appellant's Brief, pages 54–56.

Fourteenth.

This court erred in not considering and in not sustaining appellant's twenty-fifth assignment of error, reading as follows:

"The court erred in finding and holding that by the act approved January 11th, 1862, the time for paying the interest and sinking fund maturing on the loans declared on in plaintiff's petition was extended until six months after the close of the war, and that for that reason the payments in question made in treasury warrants were made before the same were due and when no payment on account of said indebtedness was required to be made, because the said act of January 11th, 1862, only extended the time for making such payments until the first day of January, 1864, or until six months after the termination of the war, if it should terminate before said date."

Statement.

The above assignment is presented in Appellant's Brief, pages 56–58.

Fifteenth.

This court erred in not considering and in not sustaining appellant's twenty-sixth, fortieth, and forty-first assignments of error, reading as follows:

"Twenty-sixth. The court erred in finding and concluding that the acts of the legislature of the State of Texas authorizing the payments in question to be made in treasury warrants were
342 passed in aid of the rebellion and were for that reason void, because there was no evidence whatever to support and the evidence is insufficient to sustain the finding that the acts or either of them were passed in aid of the rebellion, and there was nothing upon the face of said acts indicating that they were passed for any such purpose.

"Fortieth. The court erred in denying defendant credit for and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that the laws authorizing such payments to be made in treasury warrants were passed in aid of the rebellion and for that reason were void, when there was no evidence to support or sufficient to sustain such finding, and when there was nothing upon the face of said laws to indicate that they were passed for any such purpose or were for any reason invalid.

"Forty-first. The court erred in denying defendant credit for and in holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that such treasury warrants were issued in aid of the rebellion, and were for that reason illegal, when there was no evidence whatever to show that the warrants or any of them used in making such payments were other than legal and valid warrants issued before or during the war in the usual course of business on appropriations duly made for the support of the civil government of the State or for other lawful purposes and when there was no evidence whatever to support or sustain said judgment."

Statement.

The above assignments are presented together and discussed in Appellant's Brief, pages 58–70; and we also refer to the printed arguments in behalf of appellant on file and wherein the
343 questions presented by these assignments are discussed.

Sixteenth.

This court erred in overruling and in not sustaining appellant's twenty-seventh, forty-second, and forty-third assignments of error, reading as follows:

"Twenty-seventh. The court erred in finding and concluding that the acts of the legislature of the State of Texas authorizing the payments in question in treasury warrants were passed in aid of legis-

lation intended to cause State treasury warrants to be issued to circulate as money and with a view of stimulating their circulation as money and were for that reason void, because there was no evidence whatever to support and the evidence is insufficient to sustain such finding, and there was nothing upon the face of said acts indicating that they were passed for any such purpose.

"Forty-second. The court erred in denying defendant credit for and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that the laws authorizing such payments to be made in treasury warrants were passed in aid of legislation intended to cause State treasury warrants to be issued to circulate as money, contrary to the constitution of the State, and as bills of credit, contrary to the Constitution of the United States, and for those reasons were void, when there was no evidence whatever to support or sufficient to sustain such finding, and when there was nothing upon the face of said laws to indicate that they were passed for any such purpose or were for any reason invalid.

"Forty-third. The court erred in denying defendant credit for and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of
344 Texas, and in rendering judgment against defendant on the ground that such treasury warrants were issued with the intention that they should circulate as money, contrary to the constitution of the State, and as bills of credit, contrary to the Constitution of the United States, and were for those reasons illegal, when there was no evidence to support or sustain such finding and judgment or to show that any of the warrants were other than legal and valid warrants, drawn by the comptroller in the usual course of business upon the treasury of the State to pay appropriations theretofore duly made by the legislature of the State for the support of the State government, by which means alone money could be drawn from the treasury of the State."

Statement.

The above assignments are presented and discussed together in Appellant's Brief, pages 70–80, and are also discussed in the printed arguments on file in behalf of appellant, to which reference is also made.

Seventeenth.

This court erred in overruling and in not sustaining appellant's twenty-eighth assignment of error, reading as follows:

"The court erred in finding and concluding that the companies under which defendant claims, by receiving treasury warrants of the State of Texas at par in order to be entitled to use them in making the payments in question, were aiding the rebellion, and were also in so doing supporting the circulation of treasury warrants issued to circulate as money, in violation of the constitution of the State and the United States, and that for such reason defendant

acquired no right thereby to use treasury warrants in making such payments, and that State officers had no authority to accept such payments, and that they were void, because there is no evidence to support and the evidence fails to sustain such findings."

345 *Statement.*

The above assignment is presented and discussed in Appellant's Brief, pages 80–83, and is also discussed in the printed arguments filed in behalf of appellant, to which reference is made.

Eighteenth.

This court erred in overruling and in not sustaining appellant's twenty-ninth assignment of error and in not considering and in not sustaining appellant's thirtieth and thirty-first assignments of error, reading as follows:

"Twenty-ninth. The court erred in concluding and holding as matter of law that no presumption could arise or exist that the officers of the State of Texas accepting the payments in question made in treasury warrants accepted only such warrants as were issued in aid of the civil government."

"Thirtieth. The court erred in concluding and holding as matter of law that the burden of proof was upon defendant to plead and prove the particular kind and character of warrants used in making the payments in question, or that defendant was required to do more than plead and prove the payment in such treasury warrants as were acceptable to and were in fact accepted by the comptroller of the State of Texas, who was by law authorized to receive the same as such payments."

"Thirty-first. The court erred in concluding and holding as matter of law that the burden of proof was on defendant to show that the treasury warrants used in making such payments were legal and valid or to show more than the fact that the warrants used in making such payments were accepted by the officers authorized to receive the same."

Statement.

The above assignments are presented and discussed together in Appellant's Brief, pages 83–88, and are also discussed in the
346 printed arguments filed in behalf of appellant, to which reference is made.

Nineteenth.

This court erred in overruling and in not sustaining appellant's thirty-second and thirty-third assignments of error, reading as follows:

"Thirty-second. The court erred in finding and concluding that the legislature of the State of Texas and all the officers of said State were acting outside of their authority to represent the State, and that they alone and not the State of Texas were *in pari delicto* in

authorizing and receiving such payments and in subsequently ratifying the same.

"Thirty-third. The court erred in holding that the payments in question did not constitute an executed matter upon the ground that nothing was executed or accomplished by said payments, but that they were void and did not amount to payments in law, and that they were not received by the State as payments, but were received by the State's officers, because there is no evidence to support and the evidence is insufficient to sustain such finding, and the same is erroneous."

Statement.

The above assignments are presented and discussed together in Appellant's Brief, pages 89–91. They are also discussed in the printed arguments filed in behalf of appellant; to which we invite the court's attention again.

Twentieth.

This court erred in overruling and in not sustaining appellant's thirty-fourth assignment of error, reading as follows:

"The court erred, as matter of law, in holding that the legislature of the State of Texas had no power in 1870 to validate the said payments, and did not validate them."

347 *Statement.*

The above assignment is presented and discussed in Appellant's Brief, pages 91–96, and is also discussed in printed arguments filed in behalf of appellant.

Twenty-first.

This court erred in not considering and in not sustaining appellant's thirty-ninth assignment of error, reading as follows:

"The court erred in finding and holding, as matter of law, that the entire amount of the indebtedness claimed by plaintiff against defendant, and which the court found to exist, was due on the ground that defendant had been in default for more than ten days in making payments of interest and sinking fund thereon, whereas if said indebtedness exists and defendant is in default thereon it appears that such default is due to the *bona fide* and reasonable belief and contention upon defendant's part that it had paid off and satisfied said indebtedness in full by the payments in question."

Statement.

The above assignment is presented and discussed in Appellant's Brief, pages 101, 102.

Twenty-second.

This court erred in overruling and in not sustaining appellant's thirty-fifth assignment of error, reading as follows:

"The court erred in rendering judgment against defendant for the sum of $673,109.56 as principal and interest to the date of the judg-

ment, which is more than the amount claimed in plaintiff's petition, and when, according to the plaintiff's pleadings and the undisputed evidence, plaintiff, if entitled to recover at all, was in no event entitled to recover more than $645,467.27."

Statement.

The above assignment is presented and the calculation showing the error of the court below as complained of by the assignment is pointed out in Appellant's Brief, pages 102–105.

348 Twenty-third.

This court erred in overruling and in not sustaining appellant's forty-fourth and forty-fifth assignments of error, reading as follows:

"Forty-fo-rth. The court erred in rendering judgment against defendant when the undisputed evidence showed that the indebtedness declared on in plaintiff's petition had been fully paid off and satisfied upon the ground that the payments thereon shown to have been made in State treasury warrants were invalid, or that defendant was not entitled to credit therefor, when it appeared from the undisputed evidence that if the treasury warrants used in making the payments were issued in aid of the rebellion or were issued to circulate as money, contrary to the constitution of the State, or were bills of credit emitted, contrary to the Constitution of the United States, they were so issued by the State of Texas and were by it accepted without protest or objection and willingly as valid and lawful payments, and the transaction was fully executed, and that the State was *in pari delicto* if there was wrong in the transaction."

"Forty-fifth. The court erred in finding and holding that defendant was not entitled to credit for the amount shown to have been paid on account of the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant, when at the time such payments were made there were valid laws of the State of Texas in force authorizing such payments to be made in treasury warrants on the condition, in effect, that the comptroller should be satisfied that the company making such payments had accepted such warrants at par with specie for freight and passenger fares upon its railroad, and when the undisputed evidence showed that the comptroller, being so satisfied, had accepted such warrants as such payments and at the time gave due credit therefor, when there was no evidence what-
349 ever to show that the warrants so used in making such payments were illegal or invalid or other than legal and valid warrants issued before or during the war in the usual course of business on appropriations duly made for the support of the civil government of the State or for other lawful purposes, and when there was no evidence whatever of any illegality in the transaction with respect to the kind and character of warrants used or the action of the company in making such payments or otherwise, and when said payments were received and accepted without protest or objection

at the time and were acknowledged to be and treated as valid by the government of the State of Texas at that time and frequently afterwards, and when the transaction was and had been for a great number of years fully executed and completed, and when it appeared that if said warrants were illegal or if there was any illegality whatever in the transaction plaintiff was the wrong-doer and was *in pari delicto* and was not entitled to relief against the same."

Statement.

These assignments are presented and discussed together in Appellant's Brief, pages 103–110, and are also discussed in the printed arguments filed herein in behalf of appellant and to which the attention of this court is again invited.

Twenty-fourth.

This court erred in overruling and in not sustaining appellant's forty-sixth assignment of error, reading as follows:

"The court erred in rendering judgment against defendant when the uncontradicted evidence showed that the indebtedness declared on in plaintiff's petition had been fully paid and satisfied and ceased to exist upon the ground that the payments on said indebtedness made in treasury warrants, as shown by the evidence, were invalid or that defendant was not entitled to credit therefor, when it appeared that at the time such payments were made there were valid laws of the State of Texas in force authorizing such pay-
350 ments in such warrants upon the conditions specified in such laws, which conditions the undisputed evidence showed were fully complied with."

Statement.

This assignment is presented and discussed in Appellant's Brief, pages 110–112.

Twenty-fifth.

This court erred in finding and holding "that such payments as were made in State warrants were in treasury warrants intended by certain acts of the legislature of the State to circulate as money," because there is absolutely no evidence in the record to that effect and said finding and holding is without any evidence to support it. It is, moreover, strictly against the presumption which the law indulges in the absence of proof to the contrary that the warrants were legal and the transaction was in all respects lawful, and that only valid warrants were used in making the payments in question.

Twenty-sixth.

This court erred in finding and holding "that the amount due the State is the amount for which the judgment was rendered," because a calculation based upon the State's petition and the undisputed evidence will demonstrate that the judgment is for more than it should have been under any aspect of the case.

Statement.

See calculation as made in Appellant's Brief, pages 102–103.

Twenty-seventh.

This court erred in looking to and considering "the various acts of the legislature of the State during the period of the war concerning the State's revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used and the amount for which they could be *used*," as evidence that the warrants in question were illegal and as reasons or grounds for holding the laws under which the pay-
351 ments were made as unconstitutional. Such matters were not evidence in the case, and the constitution or laws authorizing such payments can properly be tested only by their own terms and provisions read in the light of the constitution.

Twenty-eighth.

This court erred in considering and basing its judgment in part upon "the size, shape, and color of the warrants issued and the small amount in which warrants were issued," because there is absolutely no evidence in the record showing "the size, shape, and color or denomination of the warrants" used in making the payments in question, and, so far as the record shows, they may have been the same in such respects as are usually issued at this time.

Twenty-ninth.

This court erred in the conclusion "that it was the purpose of various acts of the legislature during that (the war period) time to give the warrants issued during that period as much as possible a standing and character as money," because such conclusion, as shown by the context, was based upon matters outside the record and not proper to be considered and because the same is contrary to and without support in the evidence.

Thirtieth.

This court erred in its opinion that the warrants were intended to be used in some respects as money, and that the character of the legislation was to give to such warrants the added quality of money, because there is no evidence in the record to support or justify the same, and this court cannot attribute to the legislature a design to violate the constitution and indulge in inferences of fact, unsupported by the evidence in the record, to hold the laws unconstitutional, or look to general legislation in order to determine that a given law is unconstitutional, but must test the constitutionality of each act by its own terms.

352 Thirty-first.

This court erred in considering and basing its judgment upon matters and facts not found by it or set forth in its opinion or find-

ings, as will appear from that part of its opinion reading as follows: "To set out all the acts of the legislatures bearing upon this subject, with all of the facts which we have considered in connection therewith, with the well-known matters of history relating thereto, would necessarily prolong this opinion, etc.," and erred in not finding and stating all the facts upon which it based its finding and judgment.

Thirty-second.

This court erred in its conclusion that "the warrants of the State issued during the period of the war after January 1st, 1862, were intended to be circulated as money, and that the payments made in treasury warrants by the railway companies upon the obligations sued upon were in warrants issued after the time we have declared they were intended to circulate as money," because there is no evidence in the record to support such finding, and because there is no evidence to show that the warrants used in making the payments in question were issued after January 1st, 1862, or were issued at any time to be circulated as money.

Thirty-three.

If the warrants used in making the payments in question were issued to be circulated as money, and if the payments were therefore illegal, as found by this court, then this court erred in not holding that the State was *in pari delicto* and could not urge their invalidity.

Thirty-fourth.

This court erred in not holding that the State, by the legislation of 1870, recognized and ratified the validity and legality of the payments in question. That legislation was not only valid
353 as a ratification of the payments, but was also evidence conclusive that the payments were legal in all respects.

Thirty-fifth.

This court erred in holding that appellant was not entitled to remove this cause into the circuit court of the United States, and in affirming the order of the court below denying appellant's petition to remove the same.

Thirty-sixth.

This court erred in rendering judgment foreclosing a lien upon a part of appellant's railroad and other property, because there is no evidence in the record to support said judgment or to warrant this court in foreclosing a lien upon any particular part of appellant's railroad, franchises, or other property.

Thirty-seventh.

There is nothing upon the face or in the terms of any of the statutes of this State material in this case and passed upon by this

court that show- the same to be in conflict with the constitution or *to* show an unlawful purpose upon the part of the legislature in enacting the same, and this court erred in holding any such laws unconstitutional and in attributing to the legislatures a design and purpose in enacting the same to contravene the constitution of this State.

Thirty-eighth.

The acts of the legislature of the State of Texas approved December 16, 1863, May 28, 1864, and November 16, 1864, referred to in the opinion of this court, and the acceptance of the treasury warrants, in accordance with the provisions thereof, by the railway companies under which appellant claims, at par with specie for freight and passenger fares constituted a contract between
354 & 355 said companies and the State of Texas within the protection of the Constitution of the United States, and which could not, under said Constitution, be impaired by any subsequent act of the State, and this court erred in not so holding.

Thirty-ninth.

The laws authorizing the payments in question to be made in treasury warrants were valid when passed, and all persons within the limits of the State were subject thereto. The action of the railway companies under which appellant claims in accepting said warrants at par with specie for freight and passenger fares in order to use the same in making the payments in question was lawful under the laws and policy of said State at the time. The making of said payments by said railway companies and the allowance of credit therefor by the State was, at the time the transactions occurred, in compliance with the laws of said State as then in force and applicable to the parties to the transaction, as well as to all other persons within the limits of the State. Said companies thereby acquired a vested right to credit for said payments within the protection of the Constitution of the United States, especially the fourteenth amendment of said Constitution, and of which they could not be deprived by any subsequent change in the law or public policy of said State, and this court erred in not so holding.

Fortieth.

The finding and decision of this court to the effect that the warrants used in making the payments in question were illegal as having been issued with the intention that the same should circulate as money is without any support in the evidence, and is contrary to law. There is no evidence whatever in the record to show the kind, character, or denomination or the purposes for which the same were issued, and it has never been contended or even suggested by the attorney general that any of them were issued in the ab-
356 sence of an appropriation duly made by the legislature, or otherwise than in obedience to such appropriation. It is, as a matter of law, impossible for a warrant drawn by the comptroller

in the performance of his duty for the purpose of paying appropriations previously made by the legislature and payable on presentation to the treasurer to be in contravention of the State constitution prohibiting the issuance of treasury warrants, treasury notes, or paper intended to circulate as money, or of the national Constitution, prohibiting the States from emitting bills of credit. The mere inability of the State to pay all such warrants on presentation cannot have the effect to render illegal warrants drawn in obedience to appropriations and representing lawful debts and which would be lawful if the treasurer had money with which to pay the same.

Forty-first.

If it be true, as contended by the State and as found by this court, but which appellant denies, that the warrants used in making the payments in question were issued with the intention that they should circulate as money, it is, nevertheless, true beyond dispute that they represented valid debts of the State, and that upon their surrender by the railway companies in making said payments they were cancelled by the State and the indebtedness of the State evidenced by them was thereby extinguished. The State cannot, while enjoying the benefits of the transaction, repudiate it and enforce the payment over again of a debt already satisfied by the cancellation at her own instance of her own indebtedness for the same amount. The warrants were evidence of the indebtedness of the State, and by the transaction in question the State cancelled her indebtedness to the amount represented by the warrants. The State is, therefore, in law and good conscience, estopped to claim again the payment of a debt already fully satisfied by the cancellation of her own indebtedness in the same amount.

357 Forty-second.

This court erred in holding and deciding in effect that the State was not bound and could not be bound by the laws in question and the action of its executive officers under the same accepting the warrants in question and allowing the railway companies credit therefor upon the indebtedness sued on. The laws were passed by the lawful legislatures of the State and the only bodies claiming or that could claim to be the legislature of the State during the period in which they sat, and the transactions in question were conducted by the lawful officers of the State and the only persons claiming to be such officers and in obedience to such laws. The power exercised was solely that of the State, and the State enjoyed all the benefits of the transaction.

And appellant further represents that the Honorable M. M. Crane, attorney general of the State of Texas, is attorney of record for appellee, The State of Texas, in this cause, and that he resides and has his office at the capitol, in the city of Austin, and service hereof upon him as authorized by law is prayed for; and appellant further prays, for each and all of the reasons hereinbefore stated, a rehearing of this cause be granted, and that the judgment heretofore entered

herein reforming and affirming the judgment of the court below be set aside and vacated and the judgment of the court below reversed and judgment be here rendered in favor of appellant, or if for any reason judgment cannot be here rendered for appellant, then that the cause be remanded.

J. P. BLAIR,
BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Houston & Texas Central Railroad Company, Appellant.

358 (Endorsed:) Motion No. 391. No. 1714. H. & T. C. R. R. Co., appellant, *vs.* The State of Texas, appellee. Motion for rehearing. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, June 23, 1897. R. H. Connerly, clerk. With application No. 1628. Filed in supreme court December 1, 1897. Chas. S. Morse, clerk.

Order of Court of Civil Appeals, Made November 3, 1897, Overruling Motion for Rehearing and Taxing Costs against Appellant.

H. & T. C. R'y Co. *vs.* The State of Texas. } Motion 391. #1714.

Appeal from Travis county.

Motion for Rehearing.

The motion is overruled and it is ordered that the appellant, The Houston & Texas Central Railroad Company, pay all the costs of this motion.

359 In the Supreme Court of Texas, October Term, 1897.

Houston & Texas Central Railroad Company *vs.* State of Texas.

Petition for writ of error to the court of civil appeals for the third supreme judicial district.

To the honorable the supreme court of Texas:

Your petitioner, The Houston & Texas Central Railroad Company, applying for a writ of error to the court of civil appeals for the third supreme judicial district of Texas for the removal of the above-entitled cause from said court into this honorable court, respectfully represents that said cause was instituted in the fifty-third judicial district court in and for Travis county by The State of Texas, as plaintiff, against your petitioner, as defendant, for the recovery of a large balance claimed to be due on a part of the special school fund established and created under and by virtue of the act entitled "An act to establish a system of schools," approved January

31st, 1854 (Gen. Laws 1854, page 17), lent to the Houston & Texas Central Railway Company and to the Washington County Railroad Company in pursuance of an act entitled "An act to provide for the investment of the special school fund in the bonds of railroad companies incorporated by the State," approved August 13th, 1856 (Gen. Laws 1856, page 31), and the acts amendatory thereof (Gen. Laws 1856, page 57, and Gen. Laws 1858, page 57) and for the foreclosure of the lien provided by said acts which, it
360 was alleged, existed upon a part of appellant's road. The balance thus sought to be recovered, as appeared from plaintiff's petition, was the balance of such indebtedness of said companies as fixed by and ascertained under the general act of August 13th, 1870, entitled "An act for the relief of railroad companies indebted to the State for loans from the special school fund" (Gen. Laws 1870, page 85). Trial of the case resulted in judgment, on February 29th, 1896, against appellant for $673,109.56, besides costs of suit, and a lien was declared upon appellant's entire line of railroad and property and its corporate rights and franchises, and was foreclosed, and said property was ordered to be sold to satisfy said judgment. On appeal therefrom, duly taken by this appellant, to the court of civil appeals for the third supreme judicial district, the latter court, on the 9th day of June, 1897, reformed the judgment of the district court so as to foreclose a lien upon that part of appellant's road which was in existence on August 13th, 1870, together with all other property in connection therewith mentioned in the judgment of the district court, such as depots, etc., together with the franchises of that part of said road, and ordering a sale thereof to satisfy the amount of the judgment of the district court, but without rendering any judgment against appellant individually or personally for the amount of said debt, except to sell its property above mentioned in satisfaction of said amount, and, as thus reformed, the said judgment was affirmed. Motion for rehearing, presenting all the grounds hereinafter stated in support of this application, was duly filed by appellant in the said court of civil appeals on the 23rd day of June, 1897, which was thereafter, on the 3rd day of November, 1897, overruled and denied. The general nature of the case as presented by the pleadings is sufficiently stated in the opinion of the court of civil appeals, but further statements as pertain to particular grounds of this
361 application will be made hereinafter at the appropriate places, and petitioner says that in the judgment and proceedings in said cause said court of civil appeals committed error in its rulings upon questions of law, the determination of which were necessary to the decision of said cause in the court of civil appeals and which are relied upon by petitioner as grounds for its application for a writ of error herein as follows, to wit:

First.

The said court of civil appeals erred in overruling and holding not well taken appellant's first assignment of error, complaining o the action and ruling of the court below in refusing appellant's ap

plication to remove this cause into the circuit court of the United States for the western district of Texas, and in holding that the court below was authorized to proceed with this cause after the presentation of the petition and bond for such removal.

Statement.

No Federal question was presented upon the face of plaintiff's original petition (Trans., 1–7); but by plaintiff's first supplemental petition (Trans., 41–50) such question was presented in various forms. The very first exception to defendant's answer (after the general demurrer, which of course was not good) was, in effect, that the money sued for was a special fund granted by the Congress of the United States for special purposes, and that the legislature had no authority to lend or divert it. Another ground of the first special exception was that the treasury warrants used in making the payment in question were illegal and void because they were bills of credit emitted by the State, contrary to section 10, article 1, of the Constitution of the United States (Trans., 41, 42). The same constitutional question was again raised by special exception IV (Trans., 43) and by special pleas (Trans., 44–46). This supplemental petition was filed November 16th, 1895, and promptly,
362 indeed on the same day, appellant filed its application to remove the cause into the circuit court of the United States (Trans., 51–65). The petition for removal (Trans., 51–64) set forth the exceptions and pleas contained in plaintiff's first supplemental petition, as above referred to, showing that the case was one arising under the Constitution and laws of the United States, and showed also that the suit was of a civil nature; that the matter and amount in dispute therein exceeded, exclusive of interest and costs, the sum or value of $2,000, and referred to the bond accompanying the same, which was in form and conditioned as required by law (Trans., 64, 65). The court denied and refused such application to remove (Trans., 50, 51). Appellant duly excepted to the ruling, as shown by bill of exceptions No. 1 (Trans., 51–65) (Appellant's Brief, pages 19–24).

Second.

The said court of civil appeals erred in not deciding and holding that the payments in question were presumed to be legal until shown by the evidence to be otherwise, and in not deciding and holding that the burden was upon the State, as plaintiff, to plead and prove the illegality upon which it relied to avoid the payments in treasury warrants, and in not sustaining and holding well taken appellant's twenty-ninth, thirtieth, and thirty-first assignments of error, grouped and presented together, as involving substantially the same question in appellant's brief in said court, and which reads as follows:

"Twenty-ninth. The court erred in concluding and holding as matter of law that no presumption could arise or exist that the officers of the State of Texas, accepting the payments in question,

made in treasury warrants, accepted only such warrants as were issued in aid of the civil government."

"Thirtieth. The court erred in concluding and holding as
363 matter of law that the burden of proof was upon defendant to plead and prove the particular kind and character of warrants used in making the payments in question, or that defendant was required to do more than plead and prove the payment in such treasury warrants as were acceptable to and were in fact accepted by the comptroller of the State of Texas, who was by law authorized to receive the same as such payments."

"Thirty-first. The court erred in concluding and holding as matter of law that the burden of proof was on defendant to show that the treasury warrants used in making such payments were legal and valid or to show more than the fact that the warrants used in making such payments were accepted by the officers authorized to receive the same."

Statement.

See the fifth, sixth, and seventh conclusions of law filed by the trial court (Trans., 126, 127). There is an entire absence of anything in the record to show or indicate the character of the warrants used in making the payments in question, whether they were issued before or during the war, and if during the war whether for civil or military services, and nothing to indicate in any way the date or denomination of the warrants or when or the purposes for which they were issued. As far as the proof shows, they might have been issued before the war or for civil services during the war. The transcript from the books of the comptroller's office introduced in evidence showed the payments in warrants, as pleaded by appellant, were made and that they were acceptable by the comptroller, who was the officer designated by law to receive them, and that credit for such payments was duly given at the time upon the books of the State (Trans., 197, 202, 210, 211, 217, 218, 220) (Appellant's Brief, pp. 83–89 and printed arguments).

364 Third.

The said court of civil appeals erred in not deciding and holding that the trial court erred in admitting as evidence, over the objections of appellant, the message of Governor Davis to the twelfth legislature on August 6th, 1870, and extracts from the messages of November 15th, 1861, and February 5th, 1863, and November 5th, 1863, sent by Governor Lubbock to the legislature, and extracts from the messages of May 11th, 1864, and October 20th, 1864, sent by Governor Murrah to the legislature, and extracts from the recommendations of Comptroller Johns made in his annual report of November, 1861, and in not sustaining and holding well taken appellant's eighth, ninth, and sixteenth assignments of error, complaining of the rulings of the court below in admitting such evidence.

Statement.

The message of Governor Davis was a veto of an act for the relief of the Houston & Texas Central Railway Company and is set forth in the transcript, pages 241–247. To the introduction of this document counsel for defendant objected upon the grounds (1) that the same was irrelevant and not material to any issue in the case, and (2) that the conclusions, opinions, and arguments therein contained were not admissible as evidence of any fact material in the case, which objections were overruled, when counsel for defendant duly excepted (bill of exceptions No. 1; Trans., 136–137).

To the introduction of the extract from the report of C. R. Johns, comptroller (Trans., 260–262), counsel for defendant objected upon the grounds (1) that the same was irrelevant and immaterial to any issue in the case, (2) that the plaintiff could not in such manner show the purpose and intent of the legislature in enacting laws or the meaning of laws passed by the legislature, which was the purpose for which it was introduced, (3) that the same was
365 inadmissible as evidence of the intent and meaning of the acts passed by the legislature or for any other purpose, (4) that the same was not admissible as evidence of any of the facts as therein stated, (5) that it was not shown that the same referred to the kind or character of warrants used in making the payments in question and had not been connected by evidence with such warrants (bill of exceptions No. 17; Trans., 156–157).

The messages of Governors Lubboch and Murrah referred to occupy thirty-five pages of the typewritten record (Trans., 262–296). To each of these documents as offered counsel for defendant objected upon the grounds (1) that the same were irrelevant and immaterial to any issue in this case, (2) that the plaintiff could not in such manner show the purpose or intent of the legislature in enacting laws or the meaning of laws passed by the legislature, (3) that the same were inadmissible as evidence of the intent or meaning of the acts passed by the legislature or for any other purpose, (4) that the same were not admissible as evidence of the facts as therein stated, and (5) that it did not appear that the messages referred to the kind or character of warrants used in making the payments in question and had not been connected by evidence with such warrants (bills of exceptions Nos. 5, 6, 7, 9, and 10; Trans., 137–144). To each of the bills of exception taken to the introduction of the veto message of Governor Davis and of the messages of Governors Lubbock and Murrah and the report of Comptroller Johns the trial judge added the explanation that "the objectionable testimony was not considered in deciding the case," but did not state and the record does not show what he considered objectionable testimony (Appellant's Brief, pp. 38–41).

Fourth.

The said court of civil appeals erred in admitting, over
366 the objections of appellant, certified copies of certain statements and accounts in the office of the comptroller of public

accounts and of the State treasurer, as shown by appellant's tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments of error.

Statement.

See Appellant's Brief, pp. 41–44. These statements are contained in the record at pages 248–258. To their introduction as evidence the defendant objected upon the grounds (1) that they were irrelevant and immaterial to any issue in the case, (2) that they were not competent evidence in behalf of the State of the contents of the books or of any entries of the books or the comptroller's public accounts or of the treasurer of the State, (3) that they purported to be merely a copy of statements prepared in 1864 by C. H. Randolph, then treasurer of the State, and were not competent evidence in behalf of the State of the facts they purported to show, (4) that they did not show the character of the treasury warrants therein mentioned, or that they were otherwise than legal and valid, and (5) that the statements or accounts contained in the books of the comptroller or treasurer or on file in their departments were not competent evidence in behalf of the State of the facts purported to be thus shown or recorded. These objections were overruled; to which ruling the defendant excepted (bills of exceptions Nos. 11, 12, 13, 14, 15, and 16; Trans., 145–156). In approving one of these bills of exceptions (No. 11) the trial judge explained that "the objectionable evidence was not considered as evidence in deciding the case, the case having been decided upon the unconstitutionality of the statutes involved and the lack of proof by defendant each as separate, conclusive, and independent grounds for *for* the decision" (Trans., 146). The other bills of exceptions referred to were approved by him, with the explanation that "no finding of fact has been made in favor of the State upon the issues upon which
367 this evidence was introduced" (Trans., 148–158).

Fifth.

The said court of civil appeals erred in not sustaining and holding well taken appellant's eighteenth and nineteenth assignments of error, complaining of the action and ruling of the trial court in admitting, over the objections of appellant, the treasury warrants taken from the basement of the comptroller's office and introduced in evidence in connection with the testimony of plaintiff's witnesses, W. C. McCall and G. A. Proctor.

Statement.

The witnesses referred to, McCall and Proctor, testified in effect that they were employés of the comptroller's department and had been, at the instance of the attorney general, required by the comptroller to search for evidence of the character of the warrants in which the payments in question were made; that they had been unable to find any data or memoranda of any kind showing the kind or character of warrants used in making such pay-

ments; also that there was a large number of old warrants, purporting to have been issued during the war, in the basement of the comptroller's office without any endorsement or writing on them to indicate and the witnesses were unable to find any data or memoranda to indicate by whom and for what purpose or on what account such warrants were received or from whom they were received; that they had not examined all the warrants in the basement, but at the request of the attorney general, representing the plaintiff in the case, they had taken from the lot a number, which the witnesses then produced and identified as those taken by them from the basement of the comptroller's office shortly before the trial. It was these warrants thus secured and produced that were offered, to which objection was made (Trans., 301–
368 309). The witnesses further testified that they did not examine all the cancelled warrants in the basement of the comptroller's office; that they did not know whether the warrants in the basement were all the warrants that were cancelled during the war or not, and that there was nothing there, as far as the witnesses knew, to show from what source the warrants so offered in evidence were received by the comptroller and treasurer (Trans., 305. 308, 309). To the introduction of such warrants the defendant objected upon the grounds (1) that the same were irrelevant and immaterial to any issue in the case, (2) that it was not shown that they were the warrants or similar in kind and character as the warrants used in making the payments in question, (3) that it appeared that the warrants so offered were selected by plaintiff's witnesses from a mass of other warrants, the character of which *were* not shown, and (4) that said warrants were not competent evidence to show all the kind and character of warrants issued at different times and for different purposes and for different amounts during the war (bills of exceptions Nos. 19 and 20; Trans., 159–163). In approving the bills of exceptions the trial judge added the explanation that "the objectionable evidence was not considered in deciding the case," but did not specify what he considered objectionable evidence. All the warrants sent up as original documents with the record in this cause are a part of the warrants thus introduced. (See Appellant's Brief, pp. 44–47.)

Sixth.

The said court of civil appeals erred in not sustaining and holding well taken appellant's twentieth assignment of error, complaining of the action of the court below in excluding upon the objection of plaintiff cross-interrogatory No. 2 propounded to and the answer thereto by E. W. Cave, whose depositions were taken by plaintiff.

369 *Statement.*

The interrogatories and answers excluded were as follows:

"Cross-interrogatory 2. Please state, if you know, whether there was, on the 18th day of January, 1861, outstanding and then unpaid bonds and treasury warrants of the State of Texas theretofore

executed, issued, and delivered by said State, and whether there were any such bonds and warrants issued prior to the 18th day of January, 1861, and outstanding and unpaid on the 18th day of March, 1861, the 1st day of February, 1861, and during the years 1863, 1864, and 1865."

Answer to cross-interrogatory No. 2. "My recollection is that in January, 1861, and February and March, 1861, there was outstanding and unpaid a large amount of the State bonds and treasury warrants of the State of Texas previously issued, and that a large indebtedness existed at those times, for which State treasury warrants had not been then issued. The heavy drain upon the revenues of Texas for the defense of the frontier against Indians and from incursions from Mexico depleted the treasury, and State treasury warrants were issued and outstanding and unpaid, as stated, in March, 1861, and State treasury warrants were afterwards, during the war, issued to cover indebtedness and appropriations existing prior to March, 1861. I cannot speak as to the bonded indebtedness existing. I do not know what payment was made of such treasury warrants by the State of Texas. My recollection is that they were also made receivable for State taxes and State dues and for sale of the public lands" (Trans., 164–165).

The attorney general objected to this evidence upon the ground that the books and records of the treasurer's office were the best evidence of the amount of such warrants outstanding and unpaid at the times inquired about; that said question and answer were not competent evidence of such facts. (See defendant's bill
370 of exeption No. 21; Trans., 164–165.) In approving this bill of exceptions the trial judge added the explanation "that the court took judicial notice of the fact that large appropriations were made for debts incurred prior to the war, against which warrants were issued, and that all of these had been paid when defendant acquired warrants to make the payments in question" (Trans., 165). The depositions of this witness further show (Trans., 315) that he was secretary of state of the State of Texas during the administration of Governor Houston, beginning in December, 1859, and it is a fact shown by the history of the State that he was deposed from that office with Governor Houston by the secession convention in 1861 (Appellant's Brief, 47–50).

Seventh.

The said court of civil appeals erred in finding and holding that such payments as were made by appellant in treasury warrants were with treasury warrants issued after January 1st, 1862, and intended by certain acts of the legislature to circulate as money, because said finding and decision is without any evidence whatever to suppport it and is, moreover, against the presumption indulged, in the absence of proof to the contrary, that the warrants used were legal and that the transaction was in all respects lawful, and in refusing to sustain and hold as well taken appellant's twenty-seventh, forty-second, and forty-third assignments of error, grouped and presented together in appel-

lant's brief and motion for rehearing, which in effect complained of the finding and conclusion of the district court that the acts of the legislature authorizing the payments in question in treasury warrants were passed in aid of legislation intended to cause such warrants to circulate as money and as bills of credit, and that the warrants in which such payments were made were issued with the intention that they should circulate as money, contrary to the constitution of the State, and were bills of credit emitted
371 contrary to the Constitution of the United States, and that for such reasons they were illegal and the laws authorizing their payment were invalid, when there was no evidence whatever to support or sustain such finding or that said acts were illegal or to show that any of the warrants were other than legal and valid warrants drawn by the comptroller in the usual course of business upon the treasurer of the State to pay appropriations theretofore duly made by the legislature for the support of the State government.

Statement.

Appellant's twenty-seventh, forty-second, and forty-third assignments of error, referred to in the above ground, are as follows:

"Twenty-seventh. The court erred in finding and concluding that the acts of the legislature of the State of Texas authorizing the payments in question in treasury warrants were passed in aid of legislation intended to cause State treasury warrants to be issued to circulate as money and with a view of stimulating their circulation as money, and were for that reason void, because there was no evidence whatever to support and the evidence is insufficient to sustain such finding, and there was nothing upon the face of said acts indicating that they were passed for any such purpose.

Forty-second. The court erred in denying defendant credit for and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that the laws authorizing such payments to be made in treasury warrants were passed in aid of legislation intended to cause State treasury warrants to be issued to circulate as money, contrary to the constitution of the State, and as bills of credit, contrary to the
372 Constitution of the United States, and for those reasons were void, when there was no evidence whatever to support or sufficient to sustain such finding and when there was nothing upon the face of said laws to indicate that they were passed for any such purpose or were for any reason invalid.

Forty-third. The court erred in denying defendant credit for and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that such treasury warrants were issued with the intention that they should circulate as money, contrary to the constitution of the State, and as bills of credit, contrary to the Constitution of the United States, and were for those reasons illegal, when there was no

evidence to support or sustain such finding and judgment or to show that any of the warrants were other than legal and valid warrants drawn by the comptroller in the usual course of business upon the treasurer of the State to pay appropriations theretofore duly made by the legislature of the State for the support of the State government, by which means alone money could be drawn from the treasury of the State." (See Appellant's Brief, 70–80, and printed arguments.)

The evidence wholly fails to show when or for what purpose the warrants used in making the payments in question were issued or the character of the warrants in any respect, whether they were issued before or during the war, and if during the war whether for civil or military services, and nothing to indicate in any way their form or denomination. The transcript from the books of the comptroller's office introduced in evidence by appellant showed the payments as pleaded by it, and that they were in treasury warrants acceptable to and which were in fact accepted by the comptroller, who was the officer designated by law to receive them, and that credit for such payments was duly given at the time
373 upon the books of the State (Trans., 192, 202, 210, 211, 217, 218, 220). There is no evidence whatever in the record to show that the warrants so paid in were other than legal and valid warrants and nothing to sustain the finding now complained of. There is an entire failure of proof upon the part of the State to show that the warrants used in making the payments were illegal, and which is the ground upon which it sought to avoid the credits that have been given for such payments.

The district judge himself found that it had "not been proved whether the warrants actually used in making the payments were warrants issued for indebtedness incurred prior to the civil war or warrants issued for State indebtedness incurred after the war began, or, if the latter class, whether they were warrants issued for military purposes or for civil indebtedness, etc." (3rd finding of fact; Trans., 124).

There is absolutely no conflict in the evidence upon this or any other point in the case. While the statement of facts occupies a large part of the record, it consists chiefly of documents (most of which under our view were inadmissible) and documentary evidence, and the only material facts established are as follows (Appellant's Brief, 11–19):

1st. It was admitted by the defendant that the State of Texas made to the Houston & Texas Central Railway Company and to the Washington County Railroad Company, respectively, under the provisions of an act entitled "An act to provide for the investment of the special school fund in the bonds of railroads incorporated by the State," approved August 13, 1856, loans in the amounts and at the dates set forth in the plaintiff's original petition, and that said companies executed and delivered to the State of Texas on the dates and in the amounts set forth in said petition the bonds described therein in consideration of said loans (Trans., 167).

374 2nd. It was also admitted that on or before the 15th day of August, 1870, the Washington County railroad became consolidated with and merged into the Houston & Texas Central railway, and that said Houston and Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railroad Company (Trans., 167).

3rd. It was shown that appellant, The Houston and Texas Central Railroad Company, was incorporated under the general laws of the State of Texas, and more especially under the laws of March 29th, 1889 (Revised Statutes 1895, article 4550), by the filing of articles of incorporation in the office of the secretary of state on the first day of August, 1889, by F. P. Olcott and his associates, the purchaser of the railroad and the corporate rights and franchises of the Houston and Texas Central Railway Company, including the Washington County railroad, at judicial sale thereof (Trans. 167, 174).

4th. It was admitted that appellant, having been organized and existing under and by virtue of the articles of incorporation filed, as aforesaid, at the trial and at the time of the institution of this suit, was in possession and claimed, under proper deeds of conveyance from said F. P. Olcott and under such articles of incorporation, to own and operate the railroad and property described in plaintiff's original petition (Trans., 174, 175).

5th. It was admitted that all payments made on acoount of the loan to the Washington County Railroad Company described in plaintiff's petition after that company was merged into the Houston and Texas Central Railway Company, in 1870, up to May 1st, 1879, when such payments were discontinued, were made by the Houston and Texas Central Railway Company, and that all payments on account of the loan described in plaintiff's petition to the Houston & Texas Central Railway Company prior to February, 1885, were made by that company, and from February, 1885, to April,
375 1893, were made by the receivers of that company, and that the payment made subsequent to April 1st, 1893, was made by appellant (Trans., 175).

6th. Each and all the payments on account of the loans and indebtedness described in plaintiff's petition to the Houston & Texas Central Railway Company and to the Washington County Railroad Company, respectively, pleaded in appellant's first amended original answer (Trans., 8–40), were shown to have been made as therein alleged, including the payments made in treasury warrants (Trans., 197–227).

7th. It was shown that the payments made by said companies in treasury warrants, as pleaded by them, were accepted by the comptroller and treasurer of the State, and that credit therefor was at the time duly given by the comptroller on the books of his department (Trans., 200, 210, 211, 218–220).

8th. It was shown that the aggregate amount due by the Houston & Texas Central Railway Company, as said aggregate amount stood on the first day of May, A. D. 1870, on the books of the

State of Texas, on account of the loans described in plaintiff's petition was the balance remaining after allowing said company credit for all amounts theretofore paid by it thereon, as pleaded in defendant's first amended original answer, including the amounts paid, as therein alleged, in State treasury warrants, to wit, $551,550.00 instead of $657,324.35, as alleged in plaintiff's petition, and that the aggregate amount due by the Washington County Railroad Company, as said aggregate amount stood on the first day of May, A. D. 1870, on the books of the State of Texas, on account of the loans described in plaintiff's petition was the balance remaining after allowing said company credit for all amounts theretofore paid by it thereon, as pleaded in defendant's first amended original answer, including the amounts paid, as therein alleged, in State treasury warrants, to wit, $48,497.57 instead of $103,840.01,
376 as alleged in plaintiff's petition.

9th. It was shown that by allowing credit for the paymenst made in treasury warrants, as pleaded in appellant's first amended original answer and shown to have been made as there alleged, as well as for the other payments therein pleaded, the entire indebtedness declared on in plaintiff's original petition was satisfied and discharged, but that, disregarding such payments in treasury warrants and disallowing credit therefor, there would be due plaintiff, The State of Texas, the amount claimed to be due as the balance of such indebtedness, as alleged in plaintiff's original petition.

10th. The payments required to be made on account of the indebtedness due by railroad companies to the State for loan of the special school fund that were required to be made by section 1 of the act approved August 13th, entitled "An act for the relief of railroad companies indebted to the State for loans from the special school fund" (Gen. Laws 1870, page 85), were required by the comptroller and governor of the State to be made by the Houston and Texas Central Railway Company on account of its indebtedness and that of the Washington County Railroad Company without regard to the payments aforesaid made on such indebtedness in treasury warrants and as if no such payments had been made and on a basis of such indebtedness without allowing any credit for such payments. Each of the payments so exacted was made under protest, and notice of each in writing was filed with the comptroller at the time of each payment (Trans., 288, 229).

11th. The passage of the special act of the legislature of the State of Texas entitled "An act for the relief of the Houston and Texas Central Railway Company," passed August 15th, 1870, was shown (Trans., 175–196), which, among other things, merged the Washington County railroad into and made it a part of the
377 Houston and Texas Central Railway Company and placed it under the management and control of the Houston and Texas Central Railway Company in like manner as every other part of its railway, and provided for the exchange of the bonds given by the Houston and Texas Central Railway Company and the Wash-

ington County Railroad Company to the State for the loans of the special school fund made to said companies for the bonds of the Houston and Texas Central Railway Company, secured by deed of trust dated July 1st, 1866, to Shepherd Knapp and David S. Dodge, as trustees, and provided that in such exchange the Houston and Texas Central Railway Company should be allowed credit for the sums paid in the treasury warrants of the State during he years 1864 and 1865 by said company and by the Washington County Railroad Company, amounting in the aggregate to $152,864.55.

12th. It was agreed and admitted by both parties that the Washington County Railroad Company was merged into the Houston and Texas Central Railway Company in 1870, and was operated by the latter company until its property and affairs passed into the hands of receivers in February, 1885, and was operated by such receivers until April 10th, 1893, and passed with the other lines of the Houston & Texas Central Railway Company to Frederic P. Olcott by foreclosure sale in 1888, and from Olcott to appellant, organized, as aforesaid, under articles of incorporation filed August 1st, 1889, in the office of the secretary of state (Trans., 229).

13th. It was shown that the Washington County Railroad Company had no offices and no officers upon — service could be had, and had no actual existence as a corporation (Trans., 230).

14th. It was shown that the six per cent. bonds of the State issued by the comptroller and treasurer under the provisions of the aforesaid acts of December 16th, 1863, May 28th and November 15th, 1864, to and for the benefit of the special school fund for the amounts paid under said acts by railroad companies on
378 account of their indebtedness to said special school fund were paid, principal and interest, to the school fund in August, 1883, in pursuance of an act of the legislature approved February 15th, 1883 (Trans., 315, 316).

15th. It was shown that there was at the time of the trial, in the basement of the comptroller's office, in the capitol building at Austin, a large number of canceled warrants purporting to have been issued during the war, some for civil service and others for military service, but there was nothing whatever on them or on the records of the comptroller's office to indicate and no evidence was offered to show in any way how they came into the custody of the comptroller or when or from whom or for what purpose they were received at the comptroller's office (Trans., 301–309).

16th. It was shown that there was nothing on the books or the records of the comptroller's department of the State showing the date, denomination, or character of any of the treasury warrants paid in by the Houston and Texas Central Railway Company and the Washington County Railroad Company used by them in making the payments shown to have been made by them in State treasury warrants on account of the loans described in plaintiff's original petition, and nothing to show whether such warrants were issued before or after the commencement of the war in 1861, or if after that time whether they were issued for civil or military purposes (Trans., 301–309).

17th. It was shown that there was nothing upon any of the books or records of appellant or upon any of the records or books of the Houston and Texas Central Railway Company or the Washington County Railroad Company to show the date, denomination, or character of the warrants paid in by said railway company and used by them in making the payments shown to have been made by them in treasury warrants on the loans described in plaintiff's petition, and nothing to show *either* such warrants were issued
379 before or after the commencement of the war in 1861, or if issued after that time whether for civil or military purposes; and it was further shown that appellant, though making diligent effort, had been unable to secure such information or to find any person having knowledge of the kind and character of warrants used in making such payments, and also that appellant had been unable to find any person who was connected with the railway now owned by it at the time such payments were made (Trans., 309–315).

18th. It was also shown that C. H. Randolph, State treasurer during the war, and C. R. Johns, comptroller during that period, Morgan C. Hamilton, comptroller during the reconstruction period, and that ex-Governors Throckmorton, Hamilton, Davis, and Pease were dead. Johns died about ten years ago (1886); Morgan C. Hamilton died in 1895; ex-Treasurer Randolph died in 1889 or 1890; ex-Governor Throckmorton died about two years ago; ex-Governor Davis died about 1885, and ex-Governor Pease died some time subsequent to 1888, but prior to the institution of this suit (Trans., 309, 310).

Large appropriations were made just before the commencement of the war and during the war for the ordinary expenses of the civil government of the State, which the State was without means to pay. The legislature which convened on November 7th, 1859, and adjourned February 13th, 1860, appropriated for the support of the State government during the years 1860 and 1861 and for other lawful purposes $1,169,082.08 (Laws First Reg. Ses. 8th Leg., pages 1, 9, 11, 18, 20, 21, 30, 35, 36, 37, 38, 59, 79, 86, 102, 112, and 119). The extra session of the 8th legislature, which convened January 21st, 1861, and adjourned April 9th, 1861, appropriated for lawful purposes, including the defense of the frontier for the year 1860, and to meet deficiencies in former appropriations, $311,594.50 (Gen. Laws Extra Ses. 8th Leg., pages 1, 8, 17, 32, 44, 53). The
380 first regular session of the ninth legislature, which convened November 4th, 1861, and adjourned January 14th, 1862, made appropriations for the support of the civil government and for other lawful purposes, aggregating $693,252.90 (Gen. Laws First Reg. Session Ninth Leg., pages 3, 7, 31, 44, 47, 55, 56). The first extra session of the ninth legislature, which convened February 2nd, 1863, and adjourned March 6th, 1863, made appropriations for lawful purposes aggregating $293,295.60 (Gen. Laws Ex. Ses. 9th Leg., pages 7, 11, 28, and 31). It is a historical fact that the treasury of the State was practically empty at the beginning of the war, and that the revenues of the State were totally inadequate to meet the ordinary expenses of the civil government of the State during the war, and,

indeed, were practically suspended for that period. Governor Houston convened the legislature in special session on January 21st, 1861, because of the condition of the State's finances, and to provide for the large indebtedness of the State, especially that incurred for defense of the frontier against Indians. (See his message of that date.)

As already pointed out under previous grounds of this petition, the treasury warrants sent up with the record as original documents were taken from the basement of the comptroller's office during the trial in the court below by the witnesses McCall and Proctor from a mass of old warrants stored there, and no one pretends that they were warrants or a part of warrants used in making the payments in question, and there is nothing whatever to show that they are the same as or similar to the warrants used in making such payments, either in form, color, size, date, or denomination.

It is to be observed that the court of civil appeals does not find that the warrants were drawn otherwise than to pay appropriations made by the legislature for lawful purposes, and, indeed, there is no evidence whatever showing that they were drawn for any
381 other purpose than the payment of appropriations duly made by the legislature for lawful purposes.

Eighth.

The said court of civil appeals erred in holding and deciding that appellant was not entitled to credit for the payments made in treasury warrants, even if such payments were made in warrants intended to be circulated as money, when it appeared that such warrants were drawn by the comptroller upon the treasury in obedience to law to pay appropriations duly made by the legislature, and evidenced valid indebtedness of the State which was thereby extinguished, and when it appears that the transaction was regarded as legal by all parties when made, and is and long has been fully executed, and when it appears from the undisputed evidence that if such warrants and the transactions in which the payments were made were illegal, the State was a party thereto and was the wrong-doer, if there was wrong, and is therefore *in pari delicto*, and, the transaction being fully executed, the State is bound by it, and erred in not sustaining and in overruling appellant's third, fourth, thirty-second, thirty-third, forty-fourth, forty-fifth, and forty-sixth assignments of error (copied in statement below), which complained in effect of the judgment of the court below in its rulings on the pleadings, in its findings of fact, and in its conclusions of law to the effect substantially that the State was not bound by its acceptance of the payments in warrants and the credits therefor given upon its books to the railroad companies making such payments and could repudiate such payments and was not bound by its acts and the acts of its officers in the premises, and is not *in pari delicto* with respect to such transaction, although the uncontradicted evidence shows
382 that the warrants were drawn by the comptroller upon the treasurer in obedience to laws in force since the State was

created to pay appropriations duly made by the legislature, were accepted by the railroad companies at the instance of the State at par with specie for the payment of freight and passenger fares under promises on the part of the State to accept them as such payments, were accepted by the comptroller, who was the officer designated by law to receive them and who gave at the time due credit therefor, and when the undisputed evidence further showed that if there was any illegality in the warrants or any wrong whatever in the transaction the State was the wrong-doer throughout, and is therefore *in pari delicto*, and, the transaction being fully executed, the State is not entitled to relief against it.

Statement.

The assignments of error to the rulings of the court below, referred to in the above ground, and which we here copy for the convenience of the court, are as follows:

"Third. The court erred in overruling defendant's II demurrer, as contained in its first supplemental answer to the first special plea contained in plaintiff's first amended supplemental petition, and to so much of said supplemental petition as alleged in effect that the treasury warrants therein referred to were void, because issued in violation of the provision of the constitution of the State of Texas prohibiting the issuance of treasury warrants intended to circulate as money, and were bills of credit emitted by the State in contravention to the provisions of section 10, article 1, of the Constitution of the United States, which demurrer was upon the ground that— said warrants were issued in violation of the constitution of Texas and of the United States, as alleged, it appeared from said supplemental petition that they were so issued by plaintiff and by it put
383 in circulation among its citizens, and having been so issued and put in circulation, and after having contracted and agreed with the defendant to receive the same as such payment, plaintiff, The State of Texas, accepted and received the treasury warrants so paid in without protest or objection, and the transaction having been completed many years ago and being fully executed, plaintiff, being the wrong-doer, if there was wrong, and *in pari delicto*, was not entitled to have the same reopened and set aside in order that it might take advantage of its own wrong, and was estopped to question or deny the validity of the transaction in this action instituted in its own behalf, and, having received and accepted said warrants as such payment without protest or objection, it could not now repudiate its action."

"Fourth. The court erred in overruling defendant's III demurrer, as contained in its first supplemental answer to the second special plea contained in plaintiff's first amended supplemental petition, and to so much of said supplemental petition as alleged in effect that defendant should not be allowed credit for payments made in treasury warrants, and that such treasury warrants were illegal, because it was alleged that they were issued in aid of the rebellion, which demurrer was upon the ground, substantially, that if the warrants used in making the payments in question were issued in

aid of the so-called rebellion, as alleged, it appeared from said supplemental petition that they were issued by plaintiff and by it put in circulation among its citizens, and having been so issued and put in circulation, and after having contracted and agreed with defendant to receive the same as such payment, plaintiff, The State of Texas, accepted and received the treasury warrants so paid in without protest or objection, and the transaction having been completed many years ago and being fully executed, plaintiff, being the wrongdoer, if there was wrong, and *in pari delicto*, was not entitled to have the same reopened and set aside in order that it might
384 take advantage of its own wrong and was estopped to question or deny the validity of the transaction in this action instituted in its own behalf, and, having received and accepted said warrants as such payment without protest or objection, it could not now repudiate its action.

"Thirty-second. The court erred in finding and concluding that the legislature of the State of Texas and all the officers of said State were acting outside of their authority to represent the State, and that they alone and not the State of Texas were *in pari delicto* in authorizing and receiving such payments and in subsequently ratifying the same.

"Thirty-third. The court erred in holding that the payments in question did not constitute an executed matter, upon the ground that nothing was executed or accomplished by said payments, but that they were void and did not amount to payments in law, and that they were not received by the State's officers, because there is no evidence to support and the evidence is insufficient to sustain such finding, and the same is erroneous."

"Forty-fourth. The court erred in rendering judgment against defendant when the undisputed evidence showed that the indebtedness declared on in plaintiff's petition had been fully paid off and satisfied, upon the ground that the payments thereon shown to have been made in State treasury warrants were invalid, or that defendant was not entitled to credit therefor, when it appeared from the undisputed evidence that if the treasury warrants used in making the payments were issued in aid of the rebellion, or were issued to circulate as money, contrary to the constitution of the State, or were bills of credit emitted contrary to the Constitution of the United States, they were so issued by the State of Texas, and were by it accepted without protest or objection and willingly as valid and lawful payments, and the transaction was fully executed, and
385 that the State of Texas was *in pari delicto*, if there was wrong in the transaction.

"Forty-fifth. The court erred in finding and holding that defendant was not entitled to credit for the amount shown to have been paid on account of the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant, when at the time such payments were made there were valid laws of the State of Texas in force authorizing such payments to be made in treasury warrants on the condition in effect that the comptroller should be satisfied that the com-

pany making such payments had accepted such warrants at par with specie for freight and passenger fares upon its railroad, and when the undisputed evidence showed that the comptroller, being so satisfied, had accepted said warrants as such payments, and at the time gave due credit therefor, when there was no evidence whatever to show that the warrants so used in making such payments were illegal or invalid, or other than legal and valid warrants issued before or during the war in the usual course of business, or appropriations duly made for the support of the civil government of the State, or for other lawful purposes, and when there was no evidence whatever of any illegality in the transaction with respect to the kind and character of warrants used, or the action of the company in making such payments, or otherwise, and when said payments were received and accepted without protest or objection at the time, and were acknowledged to be and treated as valid by the government of the State of Texas at that time, and frequently afterward, and when the transaction was and had been for a great number of years fully executed and completed, and when it appeared that if said warrants were illegal, or if there was any illegality whatever in the transaction, plaintiff was the wrong-doer, and was *in pari delicto* and was not entitled to relief against the same.

386 "Forty-sixth. The court erred in rendering judgment against defendant when the uncontradicted evidence showed that the indebtedness declared on in plaintiff's petition had been fully paid and satisfied and ceased to exist, upon the ground that the payments on said indebtedness made in treasury warrants, as shown by the evidence, were invalid, or that defendant was not entitled to credit therefor, when it appeared that at the time such payments were made there were valid laws of the State of Texas in force authorizing such payments in such warrants upon the conditions specified in such laws, which conditions the undisputed evidence showed were fully complied with." (See also Appellant's Brief, 26 to 33, 89 to 91, and 103 to 112, and printed arguments).

The demurrers, the overruling of which is complained of in the second and third assignment of error above quoted, are contained in defendant's first supplemental answer (Trans., 75–80) and were addressed to that part of plaintiff's first amended supplemental petition setting up that the payments in question made in treasury warrants were illegal and denying on that ground that the defendant was entitled to credit therefor and seeking on such ground to avoid the payments pleaded by defendant (Trans., 66–74).

The conclusions of the trial court questioned by the thirty-second and thirty-third assignments of errors above quoted were as follows (Trans., 127):

"8. I find that it is not the State, but State officers acting outside of their authority to represent the State, who are *in pari delicto* and who have ratified what has been done, if any ratification has taken place."

"9. I hold that the payments in question did not constitute an executed matter. Nothing was executed or accomplished by said payments, as they were void and did not amount to payments in law

neither were they received as payments by the State. They
387 were unlawfully received by State officers, who did not and could not represent or bind the State in this matter."

The acts authorizing the payments to be made in warrants were (1) the act of February 9th, 1861, entitled "An act authorizing treasury warrants to be received in payment of certain dues" (Gen. Laws 8th Leg., Extra Ses., page 19); (2) the act approved December 16th, 1863, entitled "An act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due on their bonds" (Gen. Laws 10th Leg., page 37); (3) the act approved May 28th, 1864, entitled "An act amending an act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due or hereafter become due on their bonds" (Gen. Laws. 10th Leg., Called Session, page 9); (4) and the act approved November 16th, 1864, entitled "An act to authorize railroad companies to discharge their indebtedness to the special school fund with the treasury warrants and bonds and coupons of the State" (Gen. Laws 1864, 2nd Extra Session, page 14).

The transcript from the books of the comptroller's office introduced in evidence by defendant (Trans., 197, 202, 210, 211, 217, 218, 220) showed the payments in warrants as pleaded by defendant were made, and that they were in warrants of a character acceptable to the comptroller, the officer designated by law to receive them, and that credit for such payments were duly given upon the books of the State.

It is to be observed that the court of civil appeals does not find that the warrants were not drawn to pay appropriations made by the legislature for lawful purposes, and, indeed, there is no evidence whatever showing that they were drawn for any other purpose than the payment of appropriations duly made by the legislature
388 for lawful purposes.

For further statement in support of this ground we refer to the statement of the only facts established by the evidence under the seventh ground of this application.

Ninth.

The said court of civil appeals erred in holding and deciding that the acts authorizing the payments in warrants now in question were unconstitutional when there is nothing upon the face or in the terms of any of said acts to show the same to be in any respect in conflict with the constitution or to show an unlawful purpose upon the part of the legislature in enacting the same, and erred in looking to other legislation enacted during the war period and in indulging in inferences of fact as reasons for holding such acts unconstitutional instead of determining the constitutionality of such acts by their own terms.

Statement.

See twenty-ninth, thirtieth, and thirty-seventh grounds of appellant's motion for rehearing. The acts authorizing payments to be made in treasury warrants are as follows:

"An act authorizing treasury warrants to be received in payment of certain dues.

SECTION 1. Be it enacted by the legislature of the State of Texas, That the comptroller and treasurer shall receive treasury warrants for money in settlement with any individual indebted to the State, for lands under the different pre-emption laws, or laws authorizing the sale of university lands, or laws providing for the sale of the public domain. Provided, that the comptroller and treasurer shall transfer to the credit of the university and common-school fund, such warrants as may be received in payment for lands appropriated for the university and for common schools, respectively
389 which said warrants shall be paid out of any money in the treasury not necessary to pay other appropriations.

SEC. 2. The board of school commissioners are hereby authorized to receive treasury warrants in payments of the two per cent. for a sinking fund, payable by railroad companies in whose bonds the special school fund has been, or may hereafter be invested; and said warrants shall be held for the credit of said special school fund in like manner as provided by law for the investment of said sinking fund in State stocks.

SEC. 3. Where treasury warrants are tendered under the provisions of this act in payment of any indebtedness, the interest shall be computed and allowed, and when the warrants exceed the indebtedness, the holder shall be entitled to a warrant for the residue.

SEC. 4. That all laws and parts of laws conflicting with the provisions of this act, be and the same are hereby repealed; and that this act take effect and be in force from and after its passage.

Approved February 9, 1861."
(Page 19, Gen. Laws Extra Session 8th Legislature.)

"An act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may be now due or hereafter become due on their bonds.

SECTION 1. Be it enacted by the legislature of the State of Texas, That the comptroller of the State be, and he is hereby authorized to receive from the railroad companies in this State, who are indebted to the special school fund, all interest on their bonds that may now be or hereafter become due; provided, the same is tendered in
390 State bonds, or in State treasury warrants, previous to the meeting of the next regular session of the State legislature.

SEC. 2. That for all sums so paid in, the comptroller and treasurer shall issue to the special school fund the bonds of the State, bearing six per cent. interest.

SEC. 3. This act take effect from its passage.
Approved December 16th, 1863."
(Page 37, Gen. Laws Reg. Ses. 10th Legislature.)

"An act amending 'An act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due or hereafter become due on their bonds.'

SECTION 1. Be it enacted by the legislature of the State of Texas, That the provisions of the act, of which this is amendatory, shall not apply to railroad companies that fail or refuse to receive State bonds or State treasury warrants at par for freight or passage, at the prices or rates established by law.

SEC. 2. That whenever satisfactory evidence is produced or furnished to the State that any railroad company has failed or refused to receive the State bonds or State treasury warrants at par for freight or passage, at the rates established by law, he is required to refuse to receive the State bonds or treasury warrants for the interest due by said railroad upon its bonds.

SEC. 3. That the president of any railroad in this State be, and he is hereby required to post in a conspicuous place in the railroad offices, and in the passenger cars, the provisions and terms of this act, under a penalty of one hundred dollars, to be recovered for the benefit of the State, by suit before any court of competent jurisdiction upon the information of any party.

SEC. 4. That all laws or parts of laws conflicting with this act, be, and the same are hereby repealed, and that this act take effect from and after its passage.
Approved May 28th, 1864."
(Gen. Laws, Called Session, 10th Legislature, pages 9, 10.)

391 "An act to authorize railroad companies to discharge their indebtedness to the special school fund with the treasury warrants and bonds and coupons of the State.

Be it enacted by the legislature of the State of Texas, That the railroad companies of this State that are indebted to the special school fund, shall continue to be allowed the privilege of paying the interest due said fund in the treasury warrants and bonds and coupons of the State; and may also discharge the whole or any part of the principal of their indebtedness to that fund (in the same manner) provided such railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par with specie for freight and passenger travel.

That all treasury warrants and bonds and coupons of the State so received into the State treasury, shall be cancelled; and the comptroller shall issue the bonds of the State, bearing six per cent interest, to the special school fund for the amounts so paid in; and this act take effect from its passage.
Approved November 15th, 1864."
(Gen. Laws, 2nd Extra Session, 10th Legislature, page 14.)

It appears from their opinion that the court of civil appeals considered "the various acts of the legislature of the State during the period of the war concerning the State revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used and the amount for which they could be used, together with the size, shape, and color of the warrants issued and the small amounts in which warrants were issued, together with the history of the times and the well-known depleted condition of the State treasury during that period, together with the scarcity of existing reliable and available circulating medium" and other circumstances inferred by them and indicated in their opinion, as reasons for holding the above acts unconstitutional.

392 Tenth.

The said court of civil appeals erred in considering "the various acts of the legislature of the State during the period of the war concerning the Stat- revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used and the amounts for which they could be used * * * and the well-known depleted condition of the treasury during that period, together with the scarcity of an existing reliable and available circulating medium as money," as reasons and grounds for holding that the warrants used in making the payments in question were illegal or for any other purpose, as such matters were not evidence, and as there was no evidence whatever to show that the warrants used in making such payments were issued under such laws or under such circumstances or when or for what purpose they were issued, further than that they were of a character acceptable to the comptroller, who was the officer designated by law to receive them and who did receive and allow credit for them.

Statement.

See the twenty-seventh, twenty-ninth, and thirtieth grounds of appellant's motion for rehearing and pages fifteen and sixteen of the opinion of the court of civil appeals.

Eleventh.

The said court of civil appeals erred in considering and basing its judgment in part upon the size, shape, and color of the warrants issued and the small amount in which the warrants were issued, because there is absolutely no evidence in the record showing the "size, shape, and color or denomination of the warrants" used in making the payments in question, and, so far as the record shows, they may have been the same in such respects as are usually issued at this time.

393 *Statement.*

See twenty-eighth ground of appellant's motion for rehearing.

Twelfth.

The said court of civil appeals erred in considering and basing its judgment upon matters and supposed facts not found by it or set forth in its opinions or findings and in not finding and stating all the facts upon which it based its conclusion.

Statement.

See thirty-first ground of appellant's motion for rehearing.

Thirteenth.

The court of civil appeals erred in not deciding and holding that the acts of the legislature of the State of Texas approved February 9th, 1861, December 16th, 1863, May 28th, 1864, and November 16th, 1864, pleaded by appellant in its answer in the court below and quoted in the statement under the ninth ground of this petition, and the acceptance of the treasury warrants in accordance with the provisions thereof by the railway companies under which appellant claims at par with specie for freight and passenger fares constituted a contract between said companies and the State of Texas within the protection of the Constitution of the United States, which could not, under said Constitution, be impaired by any subsequent act of the State.

Statement.

See defendant's first amended answer (Trans., 8–40) and the acts above referred to and quoted above under the ninth ground of this application.

Fourteenth.

It appearing that the laws authorizing the payments in question to be made in treasury warrants were valid when passed, and that all persons within the limit of the State were subject thereto, that the action of the railway companies under which appellant claims in accepting said warrants at par with specie for freight
394 and passenger fares in order to use the same in making the payments in question was lawful under the laws and policy of the State at the time, and that the making of said payments and the allowance of credit therefor was, at the time of the transaction, in compliance with the laws of the State as then in force with respect to all persons within the limits of the State, and the said court of civil appeals erred in not deciding and holding that said companies thereby acquired a vested right to credit for said payments within the protection of the constitution of the State and of the United States, especially the fourteenth amendment of the Constitution of the United States, and that they could not be deprived of said vested right by any subsequent change in the law or public policy of said State.

Statement.

See thirty-ninth ground of appellant's motion for rehearing and the statement of facts established by the evidence as given in the statement under the seventh ground of this application.

Fifteenth.

The said court of civil appeals erred in not sustaining and holding well taken appellant's twenty-sixth, fortieth and forty-first assignments of error, grouped and presented together in appellant's brief and in the sixteenth ground of its motion for rehearing, and which read as follows:

"Twenth-sixth. The court erred in finding and concluding that the acts of the legislature of the State of Texas authorizing the payments in question to be made in treasury warrants were passed in aid of the rebellion and were for that reason void, because there was no evidence whatever to support and the evidence is insufficient to sustain the finding that the acts or either of them were passed in aid of the rebellion, and there was nothing upon the face of said acts indicating that they were passed for any such purpose.

"Fortieth. The court erred in denying defendant credit for
395 and holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that the laws authorizing such payments were passed in aid of the rebellion and for that reason were void, when there was no evidence to support or sufficient to sustain such finding and when there was nothing upon the face of said laws to indicate that they were passed for any such purpose or were for any reason invalid.

"Forty-first. The court erred in denying defendant credit for and in holding invalid the payments shown to have been made on the indebtedness declared on in treasury warrants of the State of Texas and in rendering judgment against defendant on the ground that such treasury warrants were issued in aid of the rebellion and were for that reason illegal, when there was no evidence whatever to show that the warrants or any of them used in making such payments were other than legal and valid warrants issued before or during the war in the usual course of business on appropriations duly made for the support of the civil government of the State or for other lawful purposes and when there was no evidence whatever to support or sustain said judgment."

Statement.

The court of civil appeals did not discuss the above assignments of error or the questions thereby raised and did not find, as the court below did, that the warrants in question were issued and the acts authorizing their payment were passed in aid of the rebellion. For further statement under this ground of the application, see the statements under seventh and ninth grounds above, and also appel-

!ant's brief in the court of civil appeals (pages 58–70) and the printed arguments filed by appellant in the court of civil appeals.

Sixteenth.

396 The said court of civil appeals erred in failing and refusing to sustain and hold well taken appellant's twenty-eighth assignment of error, which reads as follows:

"The court erred in finding and concluding that the companies under which defendant claims, by receiving treasury warrants of the State of Texas at par in order to be entitled to use them in making the payments in question, were aiding the rebellion, and were also in so doing supporting the circulation of treasury warrants issued to circulate as money, in violation of the constitution of the State and the United States, and that for such reason defendant acquired no right thereby to use treasury warrants in making such payments, and that State officers had no authority to accept such payments, and that they were void, because there is no evidence to support and the evidence fails to sustain these findings."

Statement.

See statement under seventh and eighth grounds of this application (also Appellant's Brief, pages 80–83).

Seventeenth.

The said court of civil appeals erred in not holding that the legislature had the power to validate and did validate the payments in question by the acts of 1870 and in not holding that said acts were sufficient evidence that the warrants used in making said payments were legal, and that the railway companies were entitled to credit therefor, and in overruling and holding not well taken appellant's thirty-fourth assignment of error, complaining of the action of the court below in holding that the legislature had no power in 1870 to validate said payments, and that it did not by said acts validate them.

Statement.

By the act entitled "An act for the relief of railroad com-
397 panies indebted to the State for loans from the special school fund," approved August 12th, 1870 (Gen. Laws 1870, page 85), and the special act entitled "An act supplementary to the act to incorporate the Buffalo Bayou, Brazos & Colorado Railway Company and to the other special acts relating to said company," approved July 27th, 1870 (Special Laws 1870, page 45), the legislature took as a basis of settlement and future payment "the aggregate amount due on account of said loans, principal and interest, as such aggregate amount stood on the first day of May, A. D. 1870."

Certified transcripts from the books of the comptroller's department showing the standing of said accounts on the first day of May, 1870, were introduced (Trans., 197–224), and these transcripts showed

that the aggregate amount of the indebtedness of said companies "as said aggregate amount stood on the 1st day of May, 1870," was as claimed by defendant and was the balance remaining after allowing said companies the credit claimed by them for payments made in treasury warrants (Trans., 197–224). For the convenience of the court we give the following summary of the account of the Houston and Texas Central Railway Company as it appears from the comptroller's books (Trans., 197–202) and of the Washington County Railroad Company (Trans., 217–218):

Summary of account with Houston and Texas Central Railway Company as it stood on the books of the comptroller of the State of Texas, as per certified transcript of folio 57, Ledger C, filed in evidence.

Total debit to column headed "Principal"	$432,000.00
" " " " "Interest"	153,520.00
Total debit to the account	$585,520.00
Less total to credit column headed "Interest"	38,290.00
Aggregate amount due on loan March 1st, 1870, principal and interest, as per comptroller's ledger	$547,230.00
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Add interest for months of March and April, 1870, being 6 % per annum on $432,000.00	4,320.00
Aggregate amount due on account loan, principal and interest, as said aggregate amount stood on the 1st day of May, 1870, as per comptroller's ledger	$551,550.00

Summary of account with Washington County railroad as it stood on the books of the comptroller of the State of Texas, as per certified transcript of folio 59, Ledger C, filed in evidence.

Total debit to column headed "Principal"	$37,017.00
" " "Interest"	11,427.98
Total debit to the account	$48,444.98
Less total to credit column headed "Interest"	317.98
Aggregate amount due on loan March 1st, 1870, principal and interest, as per comptroller's ledger	$48,127.00
Add interest for months of March and April, 1870, being 6% per annum on $37,017.00	370.17
Aggregate amount due on loans, principal and interest, as said aggregate amount stood on the first day of May, 1870	$48,497.17

By the special act entitled "An act for the relief of the Houston & Texas Central Railway Company," passed August 15th, 1870 (Special Laws 1870, page-325–328), and which is set forth in full in the transcript (pages 175–180), the validity of these payments was expressly recognized and admitted by the State. That act provided, among other things, that in making the settlement therein provided for "the Houston & Texas Central Railway Company shall be allowed a credit for the sums paid in treasury warrants of the State during the years 1864 and 1865 by the said company and the Washington County Railroad Company upon the accounts on which said sums were respectively paid by said companies, the said sums amounting, in the aggregate, to $152,864.55 (Trans., 178).

399 At the time the above-mentioned acts were passed the persons who were in the best position for knowing the character of the warrants used and the circumstances of the payments were living, but have since died (Trans., 309–311). The State's petition is grounded upon these acts (Trans., 1–8) (Appellant's Brief, 91–97).

Eighteenth.

The said court of civil appeals erred in overruling and holding not well taken appellant's fifth assignment of error, complaining of the action of the court below and overruling appellant's exceptions to so much of the State's petition as alleged that the warrants used in making such payments were at the time practically worthless and without market value, and appellant's seventh assignment of error, complaining of the action of the court below in admitting evidence of the market value of the State treasury warrants during the years 1863 and 1864.

Statement.

It was pleaded by the State in its first amended supplemental petition (Trans., 49, 50) in effect that the warrants used in making such payments were at the time almost worthless and had practically no market value, and that said railway companies could purchase them in the market at the time for a nominal, insignificant, or trifling sum, and that the State in using them was compelled to negotiate them at depreciated prices. It is also alleged that since peace was restored the acceptance of such warrants, as such *warrants*, was repudiated by the lawful officers of the State of Texas, and that ever since the State had maintained that such payments were illegal and unlawful, etc. The exception of defendant directed to this plea of the plaintiff is contained in defendant's first supplemental answer (Trans., 80).

400 Governor Lubbock, in response to questions propounded by the attorney general, testified in effect that the market price of the treasury warrants of the State of Texas issued during the war varied at different times; that they commenced depreciating and in 1863 and 1864 there was little value attached to them; that while governor he was accustomed to sell warrants issued to him for his salary from time to time, and upon his retirement from the office of gov-

ernor in November, 1863, he sold the warrants issued to him for his salary to Mr. De Foe, a druggist in Austin, for ten cents on the dollar, and he supposed that was the market value of the warrants, as he got all in cash that he could for them (Trans., 230). To this evidence counsel for defendant in due time objected upon the ground (1) that the same was irrelevant, (2) that the same was immaterial to any issue in this case, and (3) that the State could not legally complain in this case of the depreciation in the market value of her warrants; which objections were overruled, when defendant excepted (Trans., 135). In approving this bill of exceptions the trial judge explains that he "gave this testimony no effect in reaching a conclusion, because it did not appear when the defendant obtained the warrants used in payments or whether they were purchased at the market price or received at par in payment of carrying charges" (Trans., 135, 136) (Appellant's Brief, 34–38).

Nineteenth.

The said court of civil appeals erred in overruling and holding not well taken appellant's twenty-first assignment of error, which reads as follows: "The court erred in its finding and conclusion that all the allegations of fact contained in plaintiff's original petition are true, as therein stated, for there was not due and unpaid on the bonds of the Houston and Texas Central Railway Company described in said petition, on the 1st day of May, 1870, principal and interest, the sum of $657,324.35, as alleged in said *said*
401 petition; but only the sum of $551,550.00 was so due and unpaid on said date; and in finding that on said bonds of the Washington County Railroad Company there was on May 1st, 1870, $103,840.01 when only $48,497.17 was due, being the balances after allowing defendant the credit for the amounts theretofore paid by said companies, as pleaded in its first amended answer, including the amounts paid in treasury warrants, and there *was* not due plaintiff at the time of the filing of said petition the several amounts therein alleged to be then so due, because all of said indebtedness had been theretofore fully paid off and discharged."

Statement.

While the plaintiff's original petition (Trans., 1–7) stated the amount and the date of each of the loans and described the bonds given therefor, recovery was not sought for the amount of the loans or on the bonds, but merely for the balances remaining unpaid on the 1st day of May, 1870, as such balances were fixed by and were to be ascertained under the general act of August 13th, 1870 (Gen. Laws 1870, page 85). The only evidence of the amount of such balances or of such indebtedness, as such indebtedness stood on May 1st, 1870, were certified transcripts from the books of the comptroller's department (Trans., 197, 224), and these transcripts showed that the aggregate amount of the indebtedness to the State by the Houston and Texas Central Railway Company (Trans., 197–202), "as said aggregate amount stood" on the 1st day of May

1870, was $551,550, instead of $657,324.35, as alleged in plaintiff's petition, and that of the Washington County Railroad Company (Trans., 217, 218) was $48,497.57 instead of $103,810.01, as alleged in plaintiff's petition (Appellant's Brief, 50, 51).

Twentieth.

The said court of civil appeals erred in failing to sustain and
402 hold as well taken appellant's twenty-second assignment of error, which reads as follows: "The court erred in finding as a fact that neither the State nor the railroad companies discriminated as to the class of warrants received by said companies for carrying services or used in making the payments in question, and that some of all kinds were used in making the payments, because there is no evidence to support such finding and conclusion and no evidence that said railroad received or used in making such payments other than legal and valid warrants."

Statement.

The findings referred to in the above assignment are as follows:

3. "I find that it has not been proved whether the warrants actually used in making the payments were warrants issued for indebtedness incurred prior to the civil war or warrants issued for State indebtedness incurred after the war began, or, if of the latter class, whether they were warrants issued for military purposes or for civil indebtedness; but from the circumstantial evidence I conclude that neither the railroad company nor the State discriminated as to the class of warrants the railroads received for carrying services or paid on their indebtedness, and that some of all kinds were used in making the payments" (Trans., 124).

So much of this finding as is to the effect that neither the railroad company nor the State discriminated as to the class of warrants the railroads received from carrying services or paid on their indebtedness and that some of all kinds were used in making the payments is absolutely without any evidence in the record to sustain it. The transcript from the books of the comptroller's office, introduced in evidence, shows that payments in warrants, as pleaded by defendant, were made, and that they were accepted by the comptroller, who was authorized by law to
403 receive the same, and credit for such payments was duly given at the time upon the books of the State (Trans., 197–202, 210, 211, 217, 218, 220), but there was nothing whatever to indicate whether the warrants so paid in were issued before or during the war, and, if during the war, whether they were for civil or military service (Appellant's Brief, 51, 52).

Twenty-first.

The said court of civil appeals erred in failing to sustain and hold as well taken appellant's twenty-third assignment of error, which reads as follows: "The court erred in finding as a fact that the payments made in treasury warrants on the indebtedness in question

were charged off the account and the account of the State with defendant was restated May 1st, 1870, so as to ignore the said payments in treasury warrants, because there is no evidence whatever to sustain or support such finding, but the uncontradicted evidence shows that said account and said indebtedness, as it stood on the books of the State on May 1st, 1870, recognized and allowed defendant full credit for said payment in treasury warrants, and that if the same was ever charged off by the State or the account restated, so as to ignore the same, it was subsequent to May 1st, 1870."

Statement.

The finding of the court called in question by this assignment was as follows:

"4. I find that said payments in treasury warrants were charged off the account and the account of the State with the defendant railroad company was restated May 1st, 1870, so as to ignore said payments in treasury warrants."

Properly certified transcripts from the books of the comptroller's department showing the account of the State with both the
404 Houston & Texas Central Railway Company and the Washington County Railroad Company from the first loan up to and including the first day of May, 1870, was introduced in evidence (Trans., 196–224) showing the aggregate amount of said indebtedness of each of said companies as said aggregate amount stood on the first day of May, 1870. These transcripts showed that the account, as it stood on the first day of May, 1870, was as alleged in defendant's answer and showed credit to each of said companies for the payments made, as alleged, in treasury warrants, as well as for other payments theretofore made, as pleaded, and that the balance due on that date by the Houston & Texas Central Railway Company was $551,550.00 instead of $657,324.35, as claimed by the State, and by the Washington County Railroad Company was $48,497.57 instead of $103,840.01, and that said payments in treasury warrants were not charged off the account and the account of the State with the defendant railroad company restated May 1st, 1870, so as to ignore said payments, as found by the trial court. No other evidence of any kind whatever was offered by either party to show the standing of said accounts on the first day of May, 1870, and neither party offered any evidence and there was none whatever to show when such payments were recharged and said account restated, so as to ignore said payments in treasury warrants; but, as said before, the uncontroverted evidence did show that it was not on or prior to May 1st, 1870. The finding of the court, therefore, upon the point stated is absolutely without any evidence to support it (Trans., 124) (Appellant's Brief, 53, 54).

Twenty-second.

The said court of civil appeals erred in failing to sustain and hold as well taken appellant's twenty-fourth assignment of error,

which reads as follows: "The court erred in finding that it
405 was not proved that the governor was threatening to sell defendant's railroad to force the repayment of the amounts paid in treasury warrants, or whether he would have resorted to a suit to enforce such payments, because it was not disputed and the evidence abundantly established the fact."

Statement.

The written protest filed by the Houston and Texas Central Railway Company with the comptroller (Trans., 228, 229), and which the comptroller accepted and endorsed as filed in his office, showed that the comptroller refused to allow the credit for the payments theretofore made in treasury warrants, and that "the governor threatened to advertise and sell the said railways unless the full sum of interest and sinking fund claimed by" the comptroller was paid in gold by the company (Trans., 228). There was no issue upon this fact made in the proof by the State. The issue was voluntarily raised by the trial judge and first appeared in the case from the lengthy written opinion filed by the court when he announced the judgment (Trans., 120–123). See also 5th finding of fact by the court (Trans., 124) (Appellant's Brief, 54, 55).

Twenty-third.

The said court of civil appeals erred in failing to sustain and hold as well taken appellant's twenty-fifth assignment of error, which reads as follows: "The court erred in finding and holding that by the act approved January 11th, 1862, the time for paying the interest and sinking fund maturing on the loans declared on in plaintiff's petition was extended until six months after the close of the war, and that for that reason the payments in question, made in treasury warrants, were made before the same were due and when no payment on account of said indebtedness was required to be made because the said act of January 11th, 1862, only ex-
406 tended the time for making such payments until the first day of January, 1864, or until six months after the termination of the war, if it should terminate before said date."

Statement.

In the written opinion filed by him at the time the judgment appealed from was rendered the trial judge held that the payments by the railway companies in treasury warrants at the time they were made were voluntary, because he says "they were not bound to pay anything on their indebtedness to the school fund after January 11th, 1862, until six months after the close of the war. On that date the legislature passed an act relieving them from such payments until six months after the close of the war." The act referred to is as follows:

"An act for the relief of certain railroad companies of the State of Texas.

"SECTION 1. Be it enacted by the legislature of the State of Texas, That the payment of all interest and the two per cent. sinking fund due and to become due on the bonds issued by the several railroad companies of the State of Texas, for loans from the special school fund, be and the same is hereby extended until the first day of January, 1864, or until six months after the termination of the present war between the Confederate States and the United States of America, should it terminate before the time above named.

"SEC. 2. That this act shall in nowise impair the prior lien which the State now holds upon any railroad for the payment of the loans and interest now due or to become due by such roads to the State.

"SEC. 3. That this act take effect and be in force from and after its passage.

"Approved January 11, 1862" (Appellant's Brief, 56, 57).

407 Twenty-fourth.

The said court of civil appeals erred in finding and holding "that the amount due the State is the amount for which judgment was rendered," and in overruling and holding not well taken appellant's thirty-fifth assignment of error, which complains, in effect, of the action of the court below in rendering judgment against appellant for $673,109.56, as principal and interest to the date of the judgment, when, according to plaintiff's pleadings and the undisputed evidence, the State, if entitled to recover at all, was in no event entitled to recover more than $641,019.18.

Statement.

See appellant's thirty-fifth assignment of error and brief, p. 102.

Plaintiff's petition alleged that the balance due on the loan to the Washington County Railroad Company on November 1st, 1870, was $86,655.90 (Trans., 6, paragraph 15th); interest on that amount at the rate of six per cent. per annum from November 1st, 1879, to February 29th, 1896, the date of the judgment, is $84,893.76, making the total due at the date of the judgment, on account of the loan to the Washington County Railroad Company according to the State's own claim, $171,549.66.

According to the plaintiff's petition the amount due on the loan to the Houston and Texas Central Railway Company on November 1st, 1893, was $411,935 84 (Trans., 6, paragraph 16th); interest on that amount from that date to February 29th, 1896, the date of the judgment, at 6 per cent. is $57,533.68, making the total due on the loan to the Houston and Texas Central Railway Company, according to the State's own claim, $469,469.52, or to state the matter another way:

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Balance due November 1st, 1893, by H. & T. C. R'y Co	$411,935.84
Interest thereon from Nov. 1st, 1893, to Feb. 29th, 1895, at 6 per cent	57,533.68
Balance due by Washington County R. R. Co., Nov. 1st, 1879	86,655.90
Interest thereon from Nov. 1st, 1879, to Feb. 29th, 1896, at 6 per cent	84,893.76
Total due, according to the State's own claim, Feb. 2, 1896	$641,019.18

Twenty-fifth.

The said court of civil appeals erred in overruling and holding not well taken appellant's thirty-ninth assignment of error, which reads as follows: "The court erred in finding and holding as matter of law that the entire amount of the indebtedness claimed by plaintiff against defendant and which the court found to exist was due on the ground that defendant had been in default for more than ten days in making payments of interest and sinking fund thereon, whereas if said indebtedness exists and defendant is in default thereon, it appears that such default is due to the *bona fide* and reasonable belief and contention upon defendant's part that it had paid off and satisfied said indebtedness in full by the payments in question."

Statement.

It is evident from the whole record that the payments were discontinued by appellant upon the *bona fide* and reasonable belief upon its part that the indebtedness had been paid off and satisfied in full by the payments set forth in its answer.

Among the findings of the court below are the following:

"2. I conclude that the defendant and the corporations whose rights passed to defendant paid in money the payments which defendant pleads were paid in money on indebtedness sued on, and that the payments in treasury warrants pleaded by defendant were made in State treasury warrants on the dates set out in defend-
409 ant's answer and were accepted by the State's officers, to whom the payments were made, as valid payments" (Trans., 123, 124).

Of course, if the payments made in treasury warrants were valid the debt was fully satisfied. The payments were made in accordance with the acts of December, 1863, and May and November, 1864, hereinbefore referred to, and were expressly authorized by said acts as far as they are valid (Appellant's Brief, 101, 102).

Twenty-sixth.

The said court of civil appeals erred in rendering judgment foreclosing a lien upon a part of appellant's railroad and other prop-

erty specified in the judgment of said court and ordering sale thereof to satisfy the amount declared to be due by said judgment when there was no evidence whatever to support said judgment or to show what part of appellant's road was constructed prior to August 13th, 1870, or to warrant the said court in declaring or foreclosing a lien upon any part of appellant's property, and erred in not reversing and remanding the judgment of the court below for the errors complained of by appellant's thirty-sixth and thirty-seventh assignments of error in foreclosing a lien upon all of appellant's railroad, corporate property, and franchises and rendering judgment against appellant personally for the indebtedness declared to exist by said judgment.

Statement.

The district court rendered judgment foreclosing a lien upon appellant's entire railroad and all its corporate rights and franchises and also rendered personal judgment against appellant for the amount of the debt.. These rulings were complained of by appellant's thirty-sixth and thirty-seventh assignments of error (Brief, pages 97, 101). The court of civil appeals held that these assignments of error were well taken, that appellant was not
410 personally liable and that no lien existed upon its railroad, etc., except such part thereof as was in existence prior to August 13th, 1870, but proceeded to reform the judgment so as to render no personal judgment against appellant, and to foreclose a lien upon that part of appellant's road in existence on August 13th, 1870, together with all other property in connection therewith mentioned in the judgment below, such as depots, franchises, etc., of that part of the road, and this ruling was complained of as the thirty-sixth ground of appellant's motion for rehearing.

The lien given by the act of August 13th, 1870, *1856*, as amended by the act of August 26th, 1856, was upon "the road and charter rights of such company, including the road-bed, right of way, grading, bridges, iron rails, equipments and masonry, and upon all the stock subscribed for in said companies and all the depots and depot stations and property owned by such company as necessary for its business" (Gen. Laws 1856, page- 31, 37); but the act of August 13th, 1870, provided "that said lien or mortgage of the State shall not attach to any extension of its existing road hereafter constructed by any of said companies" (Gen. Laws 1870, chapter 63, pages 85, 86).

Appellant was incorporated under the general laws of the State on August 1st, 1889, by articles of incorporation filed by F. P. Olcott and associates who had purchased the railroad and all the property and rights of the Houston & Texas Central Railway Company, including the Washington County railroad, at foreclosure sale (Trans., 167–174).

The State's original petition (paragraph 9th) alleged that the road that had been constructed and completed by the Houston & Texas Central Railway Company prior to August 15th, 1870, ex

tended from the original terminus thereof "on the left bank of Buffalo bayou, in the city of Houston, in Harris county, Texas, and running thence in a general northwesterly direction
411 through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, and Limestone, including the 1st, 2nd, 3rd, 4th, 5th, and 6th sections of twenty-five miles each to a point one hundred and fifty miles from the place of beginning, about three miles south of Kosse, in Limestone county," and that on the same date the Washington County Railroad Company had constructed and completed "a line of railroad beginning at the point of junction of said Western branch with the track of the main line of the Houston & Texas Central railroad in the town of Hempstead, in Waller county, thence in a general westerly direction through Waller and Washington counties for about twenty-one and one-fourth miles to a point in the town of Brenham, in Washington county;" and the petition only claimed a lien upon such parts of appellant's road (Trans., 1–7).

Not one word of evidence was introduced to sustain the above allegations of the State's petition or to show what part of appellant's road was in existence on August 13th, 1870; therefore the judgment of the court of civil appeals foreclosing the lien is based only on the unsupported allegation of the State's original petition, without any evidence whatever.

Petitioner begs leave to refer in support hereof to its brief and to the printed arguments in its behalf filed in this cause in the court of civil appeals, and upon the stipulation of the attorney general filed herewith prays that it be allowed thirty days from the filing hereof within which to prepare and file additional arguments in support of this application.

Wherefore petitioner prays, upon each and all the grounds and for each and all the reasons hereinbefore stated, for a writ of error in this cause to the said court of civil appeals for the third supreme judicial district, as provided by law.

J. P. BLAIR,
BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Houston & Texas Central Railroad Company, Petitioner.

(Endorsed:) Application No. 1628. Houston & Texas Central Railroad Company *vs.* The State of Texas. Petition for writ of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Dec. 1, 1897. R. H. Connerly, clerk. Filed in supreme court Dec. 1, 1897. Chas. S. Morse, clerk, by F. T. Connerly, deputy.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the above and foregoing fifty-two pages contain a true and correct copy of the petition for writ of error filed in this court by the Houston & Texas Central Railroad Company in application No. 1628, Houston & Texas Central R'y Co. *vs.* The State of Texas.

Witness my hand and the seal of said court this the 26th day of April, A. D. 1898.

[SEAL.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(Endorsed:) Application No. 1628. H. & T. C. R. R. Co. *vs.* State of Texas. Certified copy of petition for writ of error. Filed in court of civil appeals, 3rd supreme judicial district, April 26th, 1898. R. H. Connerly, clerk.

412 *Order of Supreme Court of Texas Refusing Application for Writ of Error.*

In Supreme Court of Texas, Third District.

H. & T. C. R. R. Co.
vs.
THE STATE OF TEXAS.

FEBRUARY 28TH, 1898.

This day came on to be heard the application of the H. & T. C. R. R. Co. for a writ of error to the court of civil appeals for the third supreme judicial district, and, the same having been duly considered, it is ordered that said application be refused; that the applicant, the Houston & Texas Central Railroad Company, and its sureties, C. P. Huntington, Thos. H. Hubbard, Wm. D. Cleveland, Sam. Allen and C. Lombardi, pay all costs incurred on this application.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on the application of the H. & T. C. R. R. Co. for a writ of error.

Witness my hand and the seal of said court this the 24th day of March, A. D. 1898.

[SEAL.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(A motion for rehearing filed by the applicant was overruled on March 24th, 1898.)

(Endorsed:) No. 1628. H. & T. C. R. R. Co. *vs.* State of Texas. Copy of judgment in supreme court. Application for writ of error refused. Filed in court of civil appeals, 3rd sup. jud. dist. of Texas, at Austin, Texas, March 24th, 1898. R. H. Connerly, clerk.

413 *Motion for Rehearing.*

In the Supreme Court of Texas.

HOUSTON & TEXAS CENTRAL RAILROAD Company
vs.
THE STATE OF TEXAS. } Application No. 1628.

Application for writ of error to the third supreme judicial district.

Now comes The Houston & Texas Central Railroad Company, appellant in the court of civil appeals for the third supreme judicial district in the above entitled and numbered cause and applicant for writ of error in said cause in this court, and moves the court to set aside the order heretofore rendered in this cause denying its application for writ of error in said cause, and prays for a rehearing for the reasons following, to wit:

First.

This court erred in refusing and denying this applicant's petition and application for writ of error, thereby sustaining what is probably the largest judgment ever rendered for money in the courts of this State upon a controverted demand, and thereby also holding unconstitutional several acts of the legislature of the State of Texas and determining other questions of great importance to the public as well as to applicant, without a hearing and without any opportunity to applicant to be heard, through its counsel or otherwise, than by a printed brief and argument and without any written opinion or other statement being given by the court of the reasons and grounds upon which such large in-
414 terests and such important questions were thus determined.

Argument.

We earnestly submit that applicant is entitled to be heard in the supreme court of the State upon its rights involved in this case. The amount involved alone entitles it to it. While it may be true that the amount of the judgment is no more to the applicant than a smaller amount would be to some other litigant, yet the pecuniary amount involved, which is an element in practically all questions of jurisdiction, should have its due weight regardless of the other means or financial ability of the litigant. We think we are safe in saying that this judgment is for a larger amount in money than any other judgment ever rendered in any of the courts of this State upon a controverted demand, and yet the party required to pay it is not only denied a hearing in the supreme court of the State, though having duly observed every form of procedure requisite to that end, but may never know the reasons upon which it was ultimately held liable. This court has repeatedly held that the refusal of a writ of error does

not imply approval of the reasons given in the opinion of the court of civil appeals. So far as applicant knows, the reasons inducing this court to refuse the writ of error were wholly different from the reasons given by the trial court in the first instance and by the civil court of appeals in affirming the judgment. So far as applicant knows, this court may have refused the writ of error through some misapprehension of a point presented or of a part of the record which could be easily explained if attention were called to it. Possibly this may not be true, and yet it may be, for many such instances have occurred.

Aside from the question of the amount involved, this court, in refusing the writ of error, has in effect held unconstitutional at least three, and we do not know how many more, acts of the legis-
415 lature of this State, since the court of civil appeals in its opinion virtually strikes down the whole body of legislation enacted during the war which admitted at all of transactions in treasury warrants. It is certainly an anomalous system of jurisprudence that either permits an inferior court to finally declare a legislative act unconstitutional or contemplates that the supreme court will annul legislation in silence and without an opportunity being accorded to a party claiming rights under such legislation to be heard in the highest court of the State in support of it. It is true that the amendment properly left to the legislature a large measure of discretion respecting the jurisdiction of the court and the methods of procedure, but we do insist that neither the people in adopting the constitution nor the legislature in dealing with the jurisdiction of this court ever contemplated that a statute of this State should be finally declared unconstitutional without a right to some person interested under it to have a hearing in this court in support of its validity. While the jurisdiction of the court might be limited by the legislature to cases involving certain amounts and to certain classes of cases, yet it was never contemplated that it should be denied in cases involving the constitutionality of an act of the legislature. It will not do to say that the consideration and decision of an application for writ of error is the exercise of jurisdiction over the merits of the controversy. It is merely a means prescribed by the legislature without any express direction in the constitution by which the supreme court is authorized to determine whether or not it has or will exercise the jurisdiction conferred by the constitution. If it is the exercise of jurisdiction upon the questions presented, then, according to all the principles and traditions of the system of jurisprudence to which we are accustomed, the parties are entitled to be heard upon the questions. The refusal of a writ of error is a refusal
416 to take jurisdiction. Certainly this is the view of our present appellate system held by the Supreme Court of the United States (Bacon *vs.* Texas, 163 U. S., 207), and the proposition does not seem to admit of doubt. We insist, therefore, that, looking to the spirit, if not to the letter, of the constitution and statutes defining and regulating jurisdiction of this court, the supreme court ought to take jurisdiction in every case in which a court of civil appeals has held a statute of the State to be void. That it should do so was, we submit, not only contemplated by the constitution

and by the statute, but independent of that consideration every person claiming a right under any statute of the State ought to have the right of a hearing in the supreme court of the State before the statute is finally declared void. This right has been denied the applicant in this case, and we earnestly insist that in denying it the court was in error.

It is seldom, if ever, that a case involving so many questions of importance affecting not only large pecuniary interests, but also rights under the national as well as the State constitution and other questions of great public interest and importance, is presented in the courts of this State or in any of the other States. Every one who reads the opinion of the court of civil appeals or the comments upon it in any of the numerous legal publications will be impressed with the unusual character and importance of the questions involved, and many will look with interest for the ultimate decision of the case by the highest court of the State, and when informed that the parties interested were not entitled to and were denied a decision of the questions by the highest court of the State they will naturally wonder what system of jurisprudence prevails in Texas. While this suggestion, of course, does not affect the right to a writ of error, it is offered as illustrating the reasons upon which applicant insists that in a case involving so much money and so
417 many important constitutional questions it is entitled to the exercise of the jurisdiction of this court. It is not believed that in any other civilized community on earth a citizen can be deprived of so much money by the judgment of a judicial tribunal without having the right, by observing due methods of procedure, to have the highest tribunal exercising jurisdiction in such community to pass judgment upon the questions involved, nor that an act, and indeed a series of acts, of the legislative department by which important rights were conferred can be stricken down and declared unconstitutional by a subordinate court without an appeal upon the question to the highest court of the State or community and a judgment of that court upon the question.

Upon these considerations we earnestly insist that even if this court has an unquestionable right to refuse to take jurisdiction in a case involving the questions presented in this case it should not refuse to do so, but should allow the writ and determine the questions properly presented for its decision. It is a right which every citizen and every corporation ought to have in a case of such magnitude. Applicant was not allowed under the rules of the court to argue orally its cause or to be heard by the court otherwise than by printed brief and argument, and while it presented as best it could in that manner the questions involved to the court, such presentation was, at best, necessarily imperfect, and certainly much less satisfactory than an oral discussion of the questions before the court where questions might be asked and answered, but, as it is, the questions have been determined without one word from the court or any member of it indicating what was conceived to be a sufficient reason why the propositions contended for should not be sustained,

however much confidence we have in the sufficiency of the grounds urged.

Second.

This court erred in refusing to sustain and grant a writ
418 of error upon the first ground presented therefor in applicant's petition for writ of error, which reads as follows:

"The said court of civil appeals erred in overruling and holding not well taken appellant's first assignment of error, complaining of the action and ruling of the court below in refusing appellant's application to remove this cause into the circuit court of the United States for the western district of Texas, and in holding that the court below was authorized to proceed with this cause after the presentation of the petition and bond for such removal."

Argument.

We invite the court's attention to the statement and argument in support of the first ground of the petition for writ of error, as contained in the printed brief and argument supporting the application, pages 5–8, and pray the court to again consider this point. In addition to what is there said, we beg to suggest further that the effect of the State's demurrers was to admit for the purpose of the demurrers the truth of all the allegations of payment made in defendant's answer, which showed full payment of the debt declared on, and therefore constituted, if true, a complete defense to the plaintiff's suit. The case as presented by the demurrers, then, was that the debts sued on had been paid, but the State was seeking, in effect, to avoid such payments upon the ground, among others, that they were made in paper issued in violation of the Constitution of the United States, prohibiting any State from emitting bills of credit, and that such payments were therefore void, and also upon the ground that the case presented amounted to a diversion of the school fund from the purpose for which it was granted to the State. The very first ruling, therefore, that the court was called upon to make, viz., upon the demurrers presented, depended solely upon the construction of the Constitution and a law of the United States. Now, it is well settled that where it appears that some title,
right, privilege, or immunity on which a recovery depends
419 be defeated by one construction of the Constitution or a law of the United States, or sustained by a contrary construction, a removable case is presented (Carson *vs.* Dunham, 121 U. S., 421; Cooke *vs.* Avery, 147 U. S., 375). The claim that the fund in question was granted by Congress for special purposes from which the legislature could not divert it was urged as a ground of recovery, notwithstanding the payment shown to have been made. So also was the claim that the payments had been made with paper issued in violation of the Constitution of the United States, denying to the State the power to emit bills of credit. This, of course, involved the construction of the Constitution of the United States as well as the act of Congress under which the money was received by the State, and as a recovery with respect to such issues would be

defeated by one construction or sustained by another, the case comes clearly within the principle of the decision above referred to and which we understand to be unaffected by the decision in Tennessee *vs.* Bank, 152 U. S., 454. Whether these grounds were sufficient or not is wholly immaterial, since it is clear that the State relied upon them with others for recovery for overcoming defenses otherwise deemed sufficient.

It is to be borne in mind, too, that this was a suit for the foreclosure of a lien—a proceeding addressed to the equity powers of the court. But for the abolition in this State of the distinction between pleadings at law and in equity the suit would have been by a bill in equity. Since its own records show that the payments had been made, and since the transaction was fully executed, it would have been necessary in such a bill for the State to allege the ground upon which it sought to avoid the executed transaction. But whatever form the State in such a case might have adopted, no bill sufficient under the elementary rules in reference to bills in equity could have been framed and sustained that omitted reference to these payments and the grounds upon which
420 the State sought to avoid them, and thus the Federal questions would have been presented. While it is true that the forms of equity pleading are not observed here, yet we submit that our system is not available to deprive the Federal courts of jurisdiction belonging to them, or to deprive litigants of the right they have to invoke that jurisdiction, where the construction of the Constitution or a law of the United States is involved. In administering the relief sought by the plaintiff, we submit that if it was necessary for the State to allege these Federal questions at all it is wholly immaterial, so far as the right to remove is concerned, whether the allegation was contained in the original petition or presented by a subsequent and supplemental pleading. We do not understand, as the court of civil appeals seems to, that the effect of the decision of the United States Supreme Court in Tennessee *vs.* Bank, *supra*, is that plaintiff's cause of action must be based upon some act of Congress or a treaty of the United States or the Constitution of the United States. It is sufficient that the plaintiff, according to *his* statement of *his* own case, should present questions calling for a construction of the Constitution or a law or a treaty of the United States upon the construction of which some right, privilege, or immunity will depend. Whatever may be the system of pleading in force in the State where the case arises, if this appears from the plaintiff's pleading, whether in the original petition or in some subsequent pleading of the plaintiff, by whatever name it may be called, a removable case exists. The form of the pleading should not and does not properly affect the question. If it appears from the whole pleadings of the plaintiff, whether consisting of one or a dozen petitions filed at different times, that, according to the statement of *his* own claim, a Federal question is presented, the cause is properly removable to the Federal court. That the State did by its own pleadings in this cause distinctly present at least two
421 questions of this character admits of no question, and we submit that the right to remove was wrongfully denied.

Third.

This court erred in refusing to sustain and grant a writ of error upon the second ground presented therefor in applicant's petition for writ of error, which reads as follows:

"The said court of civil appeals erred in not deciding and holding that the payments in question were presumed to be legal until shown by the evidence to be otherwise, and in not deciding and holding that the burden was upon the State as plaintiff to plead and prove the illegality upon which it relied to avoid the payments in treasury warrants, and in not sustaining and holding well taken appellant's twenty-ninth, thirtieth, and thirty-first assignments of error, grouped and presented together, as involving substantially the same question in appellant's brief in said court, and which read as follows:

"'Twenty-ninth. The court erred in concluding and holding, as matter of law, that no presumption could arise or exist that the officers of the State of Texas accepting the payments in question, made in treasury warrants, accepted only such warrants as were issued in aid of the civil government.

"'Thirtieth. The court erred in concluding and holding, as matter of law, that the burden of proof was upon defendant to plead and prove the particular kind and character of warrants used in making the payments in question, or that defendant was required to do more than plead and prove the payment in such treasury warrants as were acceptable to and were, in fact, accepted by the comptroller of the State of Texas, who was by law authorized to receive the same as such payments.

"'Thirty-first. The court erred in concluding and holding, as matter of law, that the burden of proof was on defendant to
422 show that the treasury warrants used in making such payments were legal and valid, or to show more than the fact that the warrants used in making such payments were accepted by the officers authorized to receive the same.'"

Argument.

We urge the court to reconsider this ground of the application for writ of error. It is very fully discussed in our printed argument filed in support of the application (pages 9–27), and without repetition we invite the court's attention to the argument there presented. We insist that in order to sustain the judgment in question the burden of proof, which universally rests upon him who holds the affirmative, must be shifted to him who holds the negative of the issue, and presumptions always heretofore indulged must be reversed and the doctrine established by a long line of decisions of the Supreme Court of the United States respecting legislative and official actions during the war, and the presumptions obtaining in favor thereof must be repudiated, and more than one decision of this court cited in the argument referred to overruled.

Fourth.

This court erred in refusing to sustain and grant a writ of error upon the seventh ground presented therefor in applicant's petition for writ of error, which reads as follows:

"The said court of civil appeals erred in finding and holding that such payments as were made by appellant in treasury warrants were with treasury warrants issued after January 1st, 1862, and intended by certain acts of the legislature to circulate as money, because said finding and decision is without any evidence whatever to support it, and is, moreover, against the presumption indulged, in the absence of proof to the contrary, that the warrants *used* were —, and that the transaction was in all respects lawful, and in refusing to
423 sustain and hold as well taken appellant's twenty-seventh, forty-second, and forty-third assignments of error, grouped and presented together in appellant's brief and motion for rehearing, which, in effect, complained of the finding and conclusion of the district court that the acts of the legislature authorizing the payments in question in treasury warrants were passed in aid of legislation intended to cause such warrants to circulate as money and as bills of credit, and that the warrants in which such payments were made were issued with the intention that they should circulate as money, contrary to the constitution of the State, and were bills of credit emitted contrary to the Constitution of the United States, and that for such reasons they were illegal and the laws authorizing their payment were invalid, when there was no evidence whatever to support or sustain such finding, or that said acts were illegal, or to show that any of the warrants were other than legal and valid warrants drawn by the comptroller in the usual course of business upon the treasurer of the State to pay appropriations theretofore duly made by the legislature for the support of the State government."

Argument.

This ground involves the chief point upon which the court of civil appeals based its judgment, and we earnestly urge upon this court a reconsideration of it. We beg to ask the court again to read what we have said in the printed argument filed by us in this court in support of the application (pages 41–89) and to examine the authorities there cited. We earnestly insist that the finding that the warrants were in form or otherwise illegal is absolutely without any evidence to sustain it, and there is nothing whatever to show that they were in any respect illegal. Even if they were illegal in form (which we insist was not shown by one word of evidence), yet it is not disputed by the court of civil appeals, but is necessarily conceded
424 by it, that they represented valid obligations of the State and were issued upon lawful appropriations made by the legislature. But the conclusion of the court of civil appeals is that however lawful the appropriation and however just the debts the warrants were issued to cover, and notwithstanding the fact that the cancellation of the warrants when the payments were made canceled

valid obligations of the State, yet the mere matter of form is to control. It is, we confess, inconceivable to us that any court could so hold. We cannot believe that this court means to hold that a payment made in warrants issued for lawful purposes in pursuance of appropriations duly made for the support of the State government and other lawful objects is illegal and void and should be disregarded merely because the form of the warrants (that is, the size, shape, and color of the paper and the denomination of the warrants) used was illegal, and that while the transaction was effective to cancel the just obligations of the State represented by the warrants, yet it was illegal so far as it purported to cancel the debt due to the State in the payment of which the warrants were received. While we insist that the findin*d* that the warrants were in form or otherwise illegal is wholly unsustained by any evidence, yet, if that were conceded, we still insist as a legal conclusion therefrom that the validity of the payments would remain unimpaired, since it is true, so far as the court of civil appeals finds that the warrants were issued only for lawful purposes, and if illegal in any particular they were so only with respect to form. The warrants having been issued for lawful purposes, so far as the record shows, the obligation of the State to pay the amounts they represented would be today in law and morals as great as its obligation to pay the salary of the judges of this court. To hold that the State, while enjoying the benefit of the transaction in question, which accomplished the cancellation and satis-
425 faction of these obligations, can claim repayment of the debt in satisfaction of which it received them is a proposition for which, we believe, no precedent outside of this case can be found. In this connection we trust that the court will read the opinion of the Supreme Court of the United States in Little Rock *vs.* National Bank, 98 U. S., 308.

Fifth.

This court erred in refusing to sustain and grant a writ of error upon the eighth ground presented therefor in applicant's petition for writ of error, which reads as follows:

"The said court of civil appeals erred in holding and deciding that appellant was not entitled to credit for the payments made in treasury warrants, even if such payments were made in warrants intended to be circulated as money, when it appeared that such warrants were drawn by the comptroller upon the treasurer, in obedience to law, to pay appropriations duly made by the legislature and evidenced valid indebtedness of the State, which was thereby extinguished, and when it appears that the transaction was regarded as legal by all parties when made and is and long has been fully executed, and when it appears from the undisputed evidence that if such warrants and the transaction in which the payments were made were illegal the State was a party thereto and was — wrong-doer, if there was wrong, and is therefore *in pari delicto*, and, the transaction being fully executed, the State is bound by it, and erred in not sustaining and in overruling appel-

lant's third, fourth, thirty-second, thirty-third, thirty-fourth, forty-fifth, and forty-sixth assignments of error (copied in statement below), which complained in effect of the judgment of the court below in its rulings on the pleadings, in its findings of fact, and in its conclusions of law to the effect, substantially, that the State was not bound by its acceptance of the payments in warrants and the credits therefor given upon its books to the railroad companies making
426 such payments and could repudiate such payments, and was not bound by its acts and the acts of its officers in the premises and is not *in pari delicto* with respect to such transaction, although the uncontradicted evidence shows that the warrants were drawn by the comptroller upon the treasurer, in obedience to laws in force since the State was created, to pay appropriations duly made by the legislature, were accepted by the railroad companies, at the instance of the State, at par with specie for the payment of freight and passenger fares under promises on the part of the State to accept them as such payments, were accepted by the comptroller, who was the officer designated by law to receive them and who gave at the time due credit therefor, and when the undisputed evidence further showed that if there was any illegality in the warrants or any wrong whatever in the transaction the State was the wrong doer throughout, and therefore *in pari delicto*, and, the transaction being fully executed, the State is not entitled to relief against it."

Argument.

We have discussed in our printed argument in support of the application (pages 91–123) this ground of the application, and we beg to refer the court to the argument there presented as well as to the argument upon the same point filed in behalf of applicant in the court of civil appeals. We have there written about all that it seems to be practicable to thus present understandingly and pertinently in support of this ground, but much remains to be said and emphasized in support of it as well as in support of each of the other grounds of this motion by way of oral argument, which we hope the court may allow.

Sixth.

This court erred in refusing to sustain and grant a writ of error upon the ninth ground presented therefor in applicant's petition for writ of error, and which reads as follows:

427 "The said court of civil appeals erred in holding and deciding that the acts authorizing the payments in warrants now in question were unconstitutional, when there is nothing upon the face or in the terms of any of said acts to show the same to be in any respect in conflict with the constitution or to show an unlawful purpose upon the part of the legislature in enacting the same, and erred in looking to other legislation enacted during the war period and indulging in inferences of fact as reasons for holding such acts unconstitutional instead of determining the constitutionality of such acts by their own terms."

Argument.

We urge the court to reconsider this ground of the application and beg to refer to our argument filed in this court in support of the application (pages 124–135). It seems to us that argument ought not to be required to show that where a statute is clearly within the constitutional power of the legislature and is free upon its face from any apparent vice the courts cannot seek in the motives and objects of the legislature, and, indeed, facts and transactions occurring many years before, for grounds upon which to annul the act of the legislature.

Seventh.

This court erred in refusing to sustain and grant a writ of error upon the thirteenth ground presented therefor in applicant's petition for writ of error, and which reads as follows:

"The said court of civil appeals erred in not deciding and holding that the acts of the legislature of the State of Texas approved February 9th, 1861, December 16th, 1863, May 28th, 1864, and November 16th, 1864, pleaded by appellant in its answer in the court below and quoted in the statement under the ninth ground of this petition, and the acceptance of the treasury warrants in ac-
428 cordance with the provisions thereof by the railway companies, and under which appellant claims, at par with specie for freight and passenger fares, constituted a contract between said companies and the State of Texas within the protection of the Constitution of the United States, which could not, under said Constitution, be impaired by any subsequent act of the State."

Argument.

In support of this ground we beg to refer to our printed argument filed in this court (pages 139, 140). The question is not merely whether the contract shown to exist between the State and the railroad company is one within the protection of the Constitution of the United States, which denies to the States the power to pass any law impairing the obligation of contracts, but it is also whether the contract is not one which this court as a matter of general law and common justice ought not to uphold. The protection afforded by the Constitution of the United States, of course, does not relieve this court of its duty to uphold and enforce contract rights; that there was a contract entered into between the State of Texas and the railroad company by the legislation referred to admits of no question. It was a contract which all the parties to it believed at the time to be legal and binding. It was a contract entered into by the State as a means of accomplishing what was then a great object and purpose of the State government, and designed to assist the State in maintaining its existence and in performing the obligations resting upon it as a State; being regarded at the time as legal and binding, and the State in entering into it being in the exercise at the time of the only sovereign authority then existing in fact, if not in law, within the limits of the State, it is a

contract which every principle of justice demands should always be binding upon the parties to it.

429 Eighth.

This court erred in refusing to sustain and grant a writ of error upon the fourteenth ground presented therefor in applicants' petition for writ of error, and which reads as follows:

"It appearing that the laws authorizing the payments in question to be made in treasury warrants were valid when passed, and that all persons within the limits of the State were subject thereto; that the action of the railway companies under which appellant claims in accepting said warrants at par with specie for freight and passenger fares in order to use the same in making the payments in question was lawful under the laws and policy of the State at the time, and that the making of said payment and the allowance of credit therefor was at the time of the transaction in compliance with the laws of the State as then enforced with respect to all persons within the limits of the State, the said court of civil appeals erred in not deciding and holding that said companies thereby acquired a vested right to credit for said payments within the protection of the constitution of the State and of the United States, especially the fourteenth amendment of the Constitution of the United States, and that they could not be deprived of said vested right by any subsequent change in the law or public policy of said State."

Argument.

The court is again asked to consider this ground and to read the argument in support of it, as well as the argument in support of the preceding ground (pages 139–142) of the printed argument filed in this court in support of the application.

Ninth.

This court erred in refusing to sustain and grant a writ of error upon the seventeenth ground presented therefor in applicant's
430 petition for writ of error, which reads as follows:

"The said court of civil appeals erred in not holding that the legislature had the power to validate and did validate the payments in question by the acts of 1870 and in not holding that said acts were sufficient evidence that the warrants used in making said payments were legal, and that the railway companies were entitled to credit therefor, and in overruling and holding not well taken appellant's thirty-fourth assignment of error, complaining of the action of the court below in holding that the legislature had no power in 1870 to validate said payments, and that it did not by said acts validate them."

Argument.

This ground, in our judgment, is one that admits of no answer. We earnestly urge upon the court its careful consideration, and

refer to the statement and argument in support of it as presented in our printed argument filed in this court in support of the application (pages 183–200). The acts of 1870 referred to amounted not only to a clear recognition of the validity of the payments in question, but are evidence of a conclusive character that the warrants used in making the payments were in all respects legal and valid. If it be said that the legislature at that time had no power under the constitution to compromise the claim of the State, as suggested by the attorney general, we answer that the proposition only strengthens and puts beyond question our contention that the warrants used were legal and valid, and that the company was therefore entitled to the credits claimed, for in order to hold otherwise the court must hold that the legislature violated the constitution in passing the acts. If the warrants used in making the payments were valid, then, beyond any sort of controversy, these acts were valid. It must be presumed, therefore, certainly in the absence of conclusive evidence to the contrary, that the facts
431 upon which the validity of the legislative acts depend did exist. This is a proposition that ought not to be disputed in any case. The legislature in 1870 certainly knew more and had better opportunities for knowing more than this court knows from the record in this case or otherwise what kind of warrants were used in making payments in question. As was said by a most eminent writer in speaking of the duty of courts in such cases:

"They must assume that legislative discretion has been properly exercised. If evidence is required, it must be supposed that it was before the legislature when the act was passed, and if any special finding was required to warrant the passage of the particular act it would seem that the passage of the act itself might be equivalent to such finding" (Cooley's Constitutional Limitations, page 220).

Tenth.

This court erred in refusing to sustain and grant a writ of error upon the twenty-sixth ground presented therefor in applicant's petition for writ of error, which reads as follows:

"The said court of civil appeals erred in rendering judgment foreclosing a lien upon a part of appellant's railroad and other property specified in the judgment of said court and ordering sale thereof to satisfy the amount declared to be due by said judgment, when there was no evidence whatever to support said judgment or to show what part of appellant's road was constructed prior to August 13th, 1870, or to warrant the said court in declaring or foreclosing a lien upon any part of appellant's property, and erred in not reversing and remanding the judgment of the court below for the errors complained of by appellant's thirty-sixth and thirty-seventh assignments of error in foreclosing a lien upon all of appellant's railroad, corporate property, and franchises, and rendering judgment against appellant personally for the indebtedness declared to exist by said judgment."

432 *Argument.*

We are bound to believe that this court failed to carefully consider the above ground or else that we failed to present comprehensively the point involved in it, and we therefore earnestly urge the court to reconsider it. Here is a general lien which it is provided by a subsequent agreement between the parties shall attach only to so much of the property of the mortgagor as was required prior to a certain date, but which is not described in the mortgage and which can only be ascertained by evidence of the date of acquisition. Suit is brought to foreclose the mortgage, which does not itself describe the property; consequently it is necessary for plaintiff to allege in *his* petition what property is covered by the mortgage, and of course to prove it, since otherwise no property is shown to be the subject of the lien, nor is there any particular property upon which the court can establish the lien and order — sold for its satisfaction. The allegation that certain property duly described in the petition is subject to the lien is not admitted by the defendant, but is expressly denied. Upon the issue thus joined not one word of evidence is introduced. Nevertheless upon the controverted allegation of the plaintiff's petition and without any evidence whatever to support it the court finds that the property described in the petition is that covered by the lien and orders it to be sold, and we are now told that this judgment was right. This dispenses with a vast amount of evidence in many cases where it was hitherto supposed to be necessary, and if it is the law it ought to be so declared. We submit that this court has fallen into a grave error upon this point and sustained a judgment which for this reason, if for no other, ought unquestionably to be reversed.

Eleventh.

433 Without presenting and discussing such grounds separately and in detail, applicant submits that this court erred in refusing to sustain and grant a writ of error upon the third, fourth, fifth, sixth, tenth, eleventh, twelfth, sixteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fifth grounds respectively presented therefor in applicant's petition for writ of error, and urges the court to reconsider all such grounds in connection with the statement and argument in support of each as filed in this court. Our understanding is that the ground relied on for recovery and sustained by the district court and referred to in the fifteenth ground of the application for writ of error was practically eliminated by a decision of the court of civil appeals, and the error of the district court in sustaining such ground was made a ground of application for writ of error in this court only in the event that this court should consider us mistaken in our view that that ground of recovery was eliminated, and therefore we do not urge it in this motion further than as urged in the petition for writ of error. The argument, however, in support of it is applicable in a large measure to the seventh ground of the petition for writ of error, and we

refer to it as contained in the printed argument filed by us in this court (pages 144–180).

And this applicant further represents that the Honorable M. M. Crane, attorney general of the State of Texas, is attorney of record for appellee, The State of Texas, in this cause, and that he resides and has his office at the capitol, in the city of Austin, and service hereof upon him, as authorized by law, is prayed for; and applicant further prays, upon each and all of the grounds and reasons hereinbefore stated, that a rehearing of this cause be granted, and that
434 the judgment and order heretofore entered denying its application for writ of error be set aside, and that said application be granted, and that the judgment of the district court and of the court of civil appeals in this cause be reversed.

J. P. BLAIR,
BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Houston & Texas Central Railroad Company, Applicant.

(Endorsed:) Mo. No. 551. Application No. 1628. Houston & Texas Central Railroad Company *vs.* The State of Texas. Motion for rehearing. Filed in supreme court March 14, 1898. Chas. S. Morse, clerk, by F. T. Connerly, deputy.

CLERK'S OFFICE, SUPREME COURT.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above and foregoing twenty-one pages contain a true and correct copy of the motion for rehearing filed in this court by the applicant, The Houston & Texas Central Railroad Company, in application No. 1628, Houston & Texas Central Railroad Company *vs.* The State of Texas; which said motion was overruled by this court on March 24th, 1898.

Witness my hand and the seal of said court this the 26th day of April, A. D. 1898.

[SEAL.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(Endorsed:) Motion No. 551. Houston & Texas Central Railroad Company *vs.* The State of Texas. Certified copy of motion for rehearing. Filed in court of civil appeals, 3rd supreme judicial district of Texas, at Austin, Texas, April 26th, 1898. R. H. Connerly, clerk.

434a *Order of Supreme Court of Texas Overruling Motion for Rehearing of Application for Writ of Error.*

H. & T. C. R. R. Co. *vs.* STATE OF TEXAS. } Mo. No. 551.

MARCH 24TH, 1898.

Motion for rehearing of application No. 1628. Motion overruled.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the order of the

supreme court made on March 24th, 1898, overruling the motion for rehearing of application No. 1628, H. & T. C. R. R. Co. *vs.* The State of Texas.

Witness my hand and the seal of said court this the 26th day of April, A. D. 1898.

[SEAL.] CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(Endorsed:) Mo. No. 551. H. & T. C. R. R. Co. *vs.* The State of Texas. Certified copy of order of supreme court overruling motion for rehearing of application No. 1628. Filed in court of civil appeals, 3rd supreme judicial district of Texas, at Austin, April 26th, 1898. R. H. Connerly, clerk.

435 *Bill of Costs.*

In Supreme Court.

CLERK'S OFFICE, SUPREME COURT.

H. & T. C. R. R. Co.
vs.
STATE OF TEXAS. } No. 1628.

Certified copy bill of costs, supreme court.

Filing application	.50
Docketing petition	.50
Entering appearance of counsel	.50
Filing 2 briefs	.60
Filing 9 papers	2.70
Entering orders	2.00
Entering judgment on application	1.00
Certified copy of judgment	1.00
Taxing costs of application	.50
Certified copy bill of costs	1.00
Filing and entering motions 550 and 551	1.10
Total	$8.65

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said court, at Austin, this the 24th day of March, 1898.

[SEAL.] CHAS. S. MORSE, *Clerk*.

(Endorsed:) Application No. 1628. Certified copy bill of costs in supreme court, Austin, H. & T. C. R. R. Co. *vs.* State of Texas, $8.65. Filed in court of civil appeals, 3rd sup. jud. dist. of Texas, at Austin, Texas, March 24th, 1898. R. H. Connerly, clerk.

436 *Supersedeas Bond on Writ of Error.*

Know all men by these presents that we, Houston & Texas Central Railroad Company, C. P. Huntington, Thomas H. Hub-

bard, W. D. Cleveland, Sam. Allen, and C. Lombardi, as principals, and D. O. Mills, of the city of New York, State of New York, and Lloyd Tevis, of the city and county of San Francisco, State of California, and Jas. A. Baker, Jr., R. S. Lovett, H. M. Curtin, S. E. Allen, and E. R. Taylor, of Harris county, Texas, as sureties, are held and firmly bound unto the State of Texas in the full and just sum of one hundred thousand ($100,000.00) dollars, to be paid to the said State of Texas, its successors or assigns; for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a term of the court of civil appeals in and for the third supreme judicial district of Texas, in a suit depending in said court between The Houston and Texas Central Railroad Company, appellant, and The State of Texas, appellee, a judgment was rendered against the said Houston & Texas Central Railroad Company, appellant; C. P. Huntington, Thomas H. Hubbard, W. D. Cleveland, Sam. Allen, and C. Lombardi, the sureties on its appeal bond, and said Houston & Texas Central Railroad Company, C. P. Huntington, Thomas H. Hubbard, W. D. Cleveland, Sam. Allen, and C. Lombardi having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of
437 Texas, citing and admonishing said State to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof:

Now, the condition of the above obligation is such that if the said Houston and Texas Central Railroad Company, C. P. Huntington, Thomas H. Hubbard, W. D. Cleveland, Sam. Allen and C. Lombardi shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY,
C. P. HUNTINGTON,
THOS. H. HUBBARD,
W. D. CLEVELAND,
SAM. ALLEN,
C. LOMBARDI,
By BAKER, BOTTS, BAKER & LOVETT,
Their Attorneys.

JAS. A. BAKER, JR., *Surety.*
D. O. MILLS, *Surety.*
LLOYD TEVIS, *Surety.*
R. S. LOVETT, *Surety.*
H. M. CURTIN, *Surety.*
S. E. ALLEN, *Surety.*
E. R. TAYLOR, *Surety.*

STATE OF TEXAS, }
County of Harris. }

I, J. B. Williams, clerk of the district court in and for said county of Harris, do hereby certify that James A. Baker, Jr., R. S. Lovett, H. M. Curtin, S. E. Allen, and E. R. Taylor, whose names appear signed to the annexed bond, are, in my opinion, good and
438 ample security for the amount therein specified, and that if said bond was offered to me for approval the same would be accepted and approved.

To certify which I hereunto set my hand and official seal this 23rd day of April, 1898.

J. B. WILLIAMS,
[SEAL.] *Clerk District Court, Harris County, Tex.,*
By E. H. DUMBLE, *Deputy.*

I, D. O. Mills, do solemnly swear that I am worth in my own right at least the sum of fifty thousand dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts and after satisfying all encumbrances on my property which are known to me; that I reside in the county of New York, State of New York, and have said property in said State liable to execution worth fifty thousand dollars or more.

D. O. MILLS.

Subscribed and sworn to before me this 18th day of April, 1898.
[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

I, Lloyd Tevis, do solemnly swear that I am worth in my own right at least the sum of fifty thousand dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts and after satisfying all encumbrances on my property which are known to me; that I reside in the county of San Francisco, State of California, and have property in said State liable to execu-
439 tion worth fifty thousand dollars or more.

LLOYD TEVIS.

Subscribed and sworn to before me this 18th day of April, 1898.
E. B. RYAN,
[SEAL.] *Notary Public in and for the City and County if San Francisco, State of California.*

Approved this April 25th, 1898.

H. C. FISHER,
Chief Justice Court Civil Appeals, 3rd Supreme Judicial District of Texas.

(Endorsed:) Houston & Texas Central R. R. Co. *et al. vs.* State of Texas. Supersedeas bond on writ of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, April 25, 1898. R. H. Connerly, clerk.

Duplicate Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of civil appeals in and for the third supreme judicial district of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals in and for the third supreme judicial district of the State
440 of Texas, before you or some of you, being the highest court of the said State in which a decision could be had in the said suit between Houston & Texas Central Railroad Company, appellant, and C. P. Huntington, Thomas H. Hubbard, W. D. Cleveland, C. Lombardi, and Sam. Allen, its sureties, and The State of Texas, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein a title, right, privilege, or immunity was claimed under the Constitution or a treaty or statute of or commission held or authority exercised under the United States and the decision was against the title, right, privilege, or immunity specially set up or claimed under such Constitution, treaty, statute, commission, or authority, a manifest error hath happened, to the great damage of said Houston & Texas Central Railroad Company and C. P. Huntington, Thomas H. Hubbard, W. D. Cleveland, C. Lombardi, and Sam. Allen, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

441 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25 day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

D. H. HART,

[SEAL.] *Clerk Circuit Court of the United States, Western District of Texas.*

Allowed by—

H. C. FISHER,

Chief Justice of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas.

(Endorsed:) Houston & Texas Central R. R. Co. *et al. vs.* State of Texas. Duplicate writ of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, April 25, 1898. R. H. Connerly, clerk.

Assignment of Errors in United States Supreme Court.

In the Court of Civil Appeals, Third Supreme Judicial District of Texas.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY ET AL.
vs.
STATE OF TEXAS.

Now come plaintiffs in error in the above-entitled cause, and on writ of error from the Supreme Court of the United States say that in the record and proceedings in said cause there is manifest error to their prejudice, which they assign as follows:

442

First.

The district court of the State of Texas in and for Travis county (fifty-third judicial district) erred in refusing the application of Houston & Texas Central Railroad Company, one of the plaintiffs in error herein, to remove this cause into the circuit court of the United States for the western district of Texas and in holding that said district court was authorized to proceed with this cause after the presentation of the petition and bond for such removal.

Second.

The said court of civil appeals erred in overruling and holding not well taken said plaintiffs in error's first assignment of error, complaining of the action and ruling of said district court in refusing its application to remove this cause into the circuit court of the United States for the western district of Texas and in holding that said district court was authorized to proceed with this cause after the presentation of the petition and bond for such removal.

Third.

The said court of civil appeals erred in deciding against the validity of an authority exercised under the United States drawn in question in this cause.

Fourth.

The said court of civil appeals erred in deciding against the title, right, privilege, and immunity specially set up and claimed by said plaintiffs in error under the Constitution and statutes of and authority exercised under the United States.

Fifth.

The said court of civil appeals erred in deciding in favor of the validity of statutes of and authority exercised under the State
443 of Texas drawn in question in this cause on the ground of their being repugnant to the Constitution and laws of the United States.

Sixth.

The said court of civil appeals erred in giving validity to the provisions of the constitution of Texas adopted in 1869 and the statute of Texas approved August 13th, 1870, drawn in question in this cause under a construction thereof, which impaired the obligation of the contract entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the provisions of the acts of the legislature of the State of Texas approved February 9th, 1861, December 16th, 1863, May 28th, 1864, and November 15th, 1864.

Seventh.

The said court of civil appeals erred in giving effect to the constitution of Texas adopted in 1869 and the statute of Texas approved August 13th, 1870, as impairing the obligation of the contract provision entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the acts of said State approved February 9th, 1861, December 16th, 1863, May 28th, 1864, and November 15th, 1864.

Eighth.

The said court of civil appeals erred in sustaining the validity of the authority exercised under the State of Texas by the governor and comptroller thereof in cancelling and discharging credits for payments made under and in accordance with the provisions of the acts of the legislature of Texas approved February 9th, 1861, December 16th, 1863, May 28th, 1864, and November 15th, 1864,
444 drawn in question in this cause on the ground of its being repugnant to the Constitution and laws of the United States.

Ninth.

The said court of civil appeals erred in affirming the validity of the action of the State of Texas through the governor and comptroller in cancelling and discharging credits given for payments made by the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and in accordance with the said acts of February 16th, 1861, December 16th, 1863, May 28th, 1864, and November 15th, 1864, whereby said plaintiff in error was deprived of its property without due process of law, contrary to the Constitution of the United States.

Tenth.

The said court of civil appeals erred in deciding in favor of the validity of the action of the State of Texas, which, if held valid, deprived said plaintiff in error of property without due process of law.

Eleventh.

The said court of civil appeals erred in sustaining the action of the State of Texas in depriving said plaintiff in error of property, to wit, valid treasury warrants issued under authority of said State of Texas, without due process of law by taking such private property for public uses without compensation therefor.

Twelfth.

The said court of civil appeals erred in reforming and affirming the judgment of the district court in and for Travis county, Texas (fifty-third judicial district), in said cause and in not reversing said judgment and rendering the same in favor of plaintiffs in error or remanding said cause to said district court.

445 Wherefore plaintiffs in error, Houston & Texas Central Railroad Company, C. P. Huntington, Thomas H. Hubbard, W. D. Cleveland, Sam. Allen, and C. Lombardi, pray that the judgment of said court of civil appeals be reversed and said cause be remanded, and for such further proceedings as law and justice may require.

JOSEPH PAXTON BLAIR,
JAS. A. BAKER,
R. S. LOVETT,
Attorneys for Houston & Texas Central Railroad Company.
C. P. HUNTINGTON,
THOMAS H. HUBBARD,
W. D. CLEVELAND,
SAM. ALLEN, AND
C. LOMBARDI,
Plaintiffs in Error.

(Endorsed:) Houston & Texas Central R. R. Co. *vs.* State of Texas. Assignment of errors in United States Supreme Court. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, April 25, 1898. R. H. Connerly, clerk.

Order of Court of Civil Appeals Sending up Original Papers.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY
vs.
STATE OF TEXAS. } No. 1714.

Appeal from Travis county.

In the above styled and numbered cause, heretofore pending in the court of civil appeals of the third supreme judicial district of

Texas, and in which the chief justice of said court has granted
446 a writ of error in said cause in order to carry the same to the Supreme Court of the United States, the clerk of said court of civil appeals is hereby directed and ordered to make up the record and transcript in said cause by copying in full the original record now on file in this court, and to include as a part of said record that portion of the transcript now on file in this court which contains the list of State treasury warrants which by agreement of counsel in the case was considered and acted upon by the court of civil appeals as a part of the original record filed in this court. That portion of the record containing the list of warrants need not be copied into the transcript to be prepared by the clerk, but shall go up in its original form as a part of the record in the cause, and attached to the same and as a part of the record there shall be appended to the same certified copies of all orders, judgments, and decrees rendered and entered in said cause by the court of civil appeals and the supreme court of Texas, together with certified copies of all opinions delivered by the courts in said cause.

It is further ordered that the clerk of this court file the petition for writ of error, which has this day been granted in this cause, together with the bond, which has been approved, and the assignments of errors accompanying same.

Witness the official signature of H. C. Fisher, the chief justice of said court, together with the seal thereof, this the 26th day of April, A. D. 1898.

[SEAL.] H. C. FISHER,
Chief Justice Court of Civil Appeals of the Third Supreme Judicial District of Texas.

(Endorsed:) No. 1714. Houston & Texas Central R. R. Co. *vs.* The State of Texas. Appeal from Travis county. Order sending up original papers. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, April 26th, 1898. R. H. Connerly, clerk.

447 *Bill of Costs in Court of Civil Appeals.*

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY *vs.* STATE OF TEXAS. } No. 1714.

Appeal from Travis county.

Filing record	.50
Docketing cause	.50
Appearances	1.00
Filing briefs	1.90
Filing and entering motion	.35
Orders	2.50
Filing 10 extra papers	1.00
Continuances	.40

Judgment	1.00
Taxing costs	.50
Mandate	1.50
Recording	12.00
Certified copy of bill of costs, 2	1.50
Costs of supreme court	8.65
Transcript fee (from district court)	224.25
Notices, setting case	1.50
Notices, result of case	1.50
Notices on rehearing	1.50
Issuing 1 precept	1.00
Sheriff's fees	1.15
Copies of motion	10.50
Copies orders to supreme court	2.00
Transcript from court of civil appeals to United States Supreme Court	271.20
Total	$547.90

448 *Clerk's Certificate.*

Clerk's office, court of civil appeals, at Austin.

I, R. H. Connerly, clerk of the court of civil appeals for the third supreme judicial district of the State of Texas, hereby certify that the foregoing 447 pages contain true and correct copies of the proceedings had in the district court of Travis county in this court and in the supreme court of Texas in the case of The Houston & Texas Central Railroad Company *v.* The State of Texas as the same appear from the files of said cause in this court.

Witness my signature and the seal of said court, at office, in the city of Austin, this the 10th day of May, A. D. 1898.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY, *Clerk.*

449 HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY *vs.* THE STATE OF TEXAS. } No. —.

To any justice of the Supreme Court of the United States or the chief justice of the court of civil appeals in and for the third supreme judicial district of Texas:

Your petitioner, Houston and Texas Central Railroad Company, is a railroad corporation created under and by virtue of the laws of the State of Texas, and C. P. Huntington, Thos. H. Hubbard, W. D. Cleveland, Sam'l Allen, and C. Lombardi respectfully represent that in the above numbered and entitled cause, then pending therein on appeal from the district court of Travis county, and wherein petitioner, Houston and Texas Central Railroad Company, was the only party appellant and said Huntington, Hubbard, Cleveland,

Allen, and Lombardi were the sureties on its appeal bond and The State of Texas was the only appellee, the court of civil appeals in and for the third supreme judicial district for the State of Texas on the 9th day of June, 1897, reformed and as reformed affirmed a judgment in said cause rendered on the 29th day of February, 1896, by the fifty-third judicial district court in and for Travis county, Texas, in favor of The State of Texas as plaintiff and against your petitioner as defendant in said district court and rendered judgment against said Huntington, Hubbard, Cleveland, Allen, and Lombardi, its sureties, for all costs of suit; that thereafter and in due time your petitioner filed in the said court of civil appeals a motion for rehearing, which was thereafter, on the 3rd day of November, 1897, overruled and denied; that thereafter and in due time your petitioner applied in due form and as authorized by law to the supreme court of the State of Texas for a writ of error in said cause to the said court of civil appeals, which application was thereafter, to wit, on the 28th day of February, 1898, by said supreme court denied and the writ of error prayed for by
450 petitioner refused; that petitioner then applied in due form and in due time to the said supreme court for a rehearing, which application was thereafter, to wit, on the 24th day of March, 1898, denied; whereupon the said judgment of the said court of civil appeals, which is the highest court of said State in which a decision in said suit could be had, became and is final.

And petitioners say that they are aggrieved by the said judgment and proceedings in said suit, and that in the said judgment and proceedings had prior thereto in said cause errors were committed to the prejudice of petitioners, because they say there was in said suit drawn in question the validity of a statute of or an authority exercised under the United States and the decisions in said suit was against their validity, and there was drawn in question the validity of a statute or constitution of or an authority exercised under a State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision in said suit was in favor of their validity, and that titles, rights, privileges, and immunities were in said suit claimed by petitioners under the Constitution and statutes of and commissions held and authority exercised under the United States and the decision in said suit was against the titles, rights, privileges, and immunities specially set up and claimed therein by petitioners under such Constitution, statutes, commissions, and authority, as will hereinafter more fully appear.

Your petitioners say that this suit was instituted on the 8th day of December, 1895, in the fifty-third judicial district court in and for Travis county, Texas, by the attorney general of Texas, in the name and on behalf of The State of Texas, as plaintiff, against petitioner railroad company, as defendant, upon which date the plaintiff State filed its original petition in said district court, praying judgment against said petitioner, as defendant, for the sum of $86,655.90, with six per cent. per annum interest thereon, payable semi-annually, from May 1st, 1879, to

the commencement of said suit, with legal interest on said interest from the time the same was payable, alleged to be the balance due upon certain bonds in said original petition described and therein alleged to have been made, executed, and delivered by a railroad corporation known as the Washington County
451 Railroad Company to the plaintiff State for a part of the special school fund of the State of Texas established and created under and by virtue of an act of the legislature of the said State entitled "An act to establish a system of schools," approved January 31st, 1854, alleged to have been loaned the said railroad company under and by virtue of an act of the legislature of said State entitled "An act to provide for the investment of the special school fund in the bonds of railroad companies incorporated by the State," approved August 31st, 1856, and praying judgment against petitioner railroad company as defendant; also for the sum of $411,935.84, with six per cent. per annum interest thereon, payable semi-annually, from the first day of May, 1894, to the commencement of said suit, with legal interest on said interest from the time same was payable, alleged to be the balance due upon certain bonds in said original petition described and therein alleged to have been made, executed, and delivered by "the Houston and Texas Central Railway Company" to the plaintiff State for a part of the said special school fund of the State of Texas alleged to have been loaned the said railway company under and by virtue of said act of August 13, 1856, and praying the foreclosure of a lien alleged in said original petition upon the railroad and property of petitioner therein described, which the said plaintiff State alleged petitioner railroad company had acquired from the said Washington County Railroad Company and from the said "The Houston and Texas Central Railway Company," subject to the said lien; that reference was made in said original petition to an act of the legislature of the said State entitled "An act for the relief of railroad companies indebted to the State for loans from the special school fund," approved August 13th, 1870, whereby railroad companies indebted to the special school fund were required, in order to avoid foreclosure and sale of their property for past delinquencies, to pay on November 1, 1870, six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, 1870, and, in addition, one per cent. upon said aggregate amount to be applied towards the sinking fund, and should thereafter pay into the treasury of the State six months' interest and one per cent. on account of
452 the sinking fund, semi-annually, on the first days of May and November in each year, and it was alleged in said original petition that the aggregate amount due by the said Washington County Railroad Company on account of said loan to it, as said aggregate amount stood on May 1, 1870, was $103,840.01, and that the aggregate amount of the indebtedness of the Houston and Texas — Railway Company to the State on account of said loan to it, as said aggregate amount stood on May 1st, 1870, was $657.324.35, and it was further alleged in said original petition that

by payments made by or on behalf of said Washington County Railroad Company from November 1, 1870, to May 1, 1879, inclusive, its aforesaid indebtedness had been reduced to $86,655.90, and that no payments on account thereof had been made since May 1st, 1879, and that by payments made by or on behalf of the said "The Houston and Texas Central Railway Company" from November 1, 1870, to November 1, 1893, inclusive, its aforesaid indebtedness had been reduced to $411,935.84, and that no payments on account thereof had been made since November 1st, 1893.

Your petitioners aver that it did not in any way appear from the statement by said plaintiff State of its own claims in said original petition and did not elsewhere in and by said original petition in any manner appear that the said suit was one arising under the Constitution or laws of the United States or treaties made under their authority, but the character of said suit and the parties thereto and the effect of the averments of said original petition were as hereinabove alleged and not otherwise.

Your petitioners further say that on the said 8th day of December, 1894, upon the filing of the plaintiff State's said original petition, citation duly issued in said cause and was served upon petitioner railroad company as defendant therein, in obedience to which said petitioner, as such defendant, was required under the laws of the State of Texas to answer the said original petition on the 8th day of January, 1895, and, being so required, said petitioner, as such defendant, did, on January 7, 1895, file its original answer to said original petition, and thereafter, on March 15th, 1895, petitioner, as said defendant, as authorized by the laws of the State of Texas and with leave of said district court of Travis county,
453 filed in said cause its first amended original answer in lieu of and as a substitute for its original answer aforesaid; that, in addition to a general demurrer to and a general denial of the allegations in said original petition contained, the said answer pleaded in defense to the State's demand that certain payments on account of the said loans of said school fund had been made by the Washington County Railroad Company during the years 1864 and on May 11, 1865, and by the Houston and Texas Central Railway Company during the year 1864, in the treasury warrants of the State of Texas, as authorized by certain laws of the State enacted in 1863 and 1864, hereinafter referred to, which payments in treasury warrants as aforesaid had been received and accepted and credit given therefor on the books of the State by the proper officers of the State, as they were authorized and required by the said laws of the State to do, and that by virtue and means of said payments and of the subsequent payments admitted in said original petition of the State to have been made the entire indebtedness of said railroad companies on account of said loans of said school fund had been fully paid and discharged; that it thus appeared that the real nature of the State's demand and the real object of her suit was to set aside and have declared null the payments made as aforesaid in treasury warrants of the State and to recover again the portion of the said indebtedness which

had been once discharged by said payments; that the said first amended answer as well as the original answer, of which it took the place, after referring to the legislation of the State of Texas creating the special school fund and authorizing the loan thereof to certain railroad corporations and to the loan of said school fund to the Washington County Railroad Company and to the Houston and Texas Central Railway Company, and the execution and delivery of the bonds of said companies in return therefor, and to payments made by them on account thereof at various dates down to August 31st, 1860, inclusive, made the following averments:

454 6. That before the next payment of principal or interest upon said loans became due, either by the said Houston & Texas Central Railway Company or by the Washington County Railroad Company, and early in the year 1861, the civil war between Texas and the other States of the Southern Confederacy and the United States began, and as a result of the commencement of such war the business of said railway companies, in common with all other business and enterprises of the State, became paralyzed and said railway companies rendered utterly unable to pay either the interest or sinking fund upon said loans as the same matured; that recognizing this, and in view of the distressing condition of the country at that time, the State of Texas passed an act which was approved Jan. 11, 1862, entitled "An act for the relief of certain railroad companies of the State of Texas," which provided that the payment of all interest and the two per cent. sinking fund due and to become due on the bonds issued by the several railroad companies of the State of Texas for loans from the special school fund should be and the same was thereby extended until the first day of January, 1864, or until six months after the termination of the then existing war between the Confederate States and the United States of America, should it terminate before said 1st day of January, 1864, and provided further that said *act* should in nowise impair the prior lien which the State then held upon any railroad for the payment of the loans and interest then due or to become due by said roads to the State.

7. That on account of the scarcity of money, the disturbance of trade, and the practical suspension of business as a result of the then prevailing war, the State of Texas was unable to collect the taxes necessary to the support of the State government or to meet its outstanding obligations, and had then outstanding its obligations in the form and of the character of warrants drawn by its comptroller on the State treasurer for claims and demands against the State for which the legislature had theretofore made appropriations, but which the treasurer was unable to pay for lack of funds, when, for the purpose of aiding in the maintenance of its credit, on the 16th day of December, 1863, the legislature of Texas passed an act entitled "An act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due on their bonds," which act was approved December 16th, 1863, and was as follows:

"SECTION 1. Be it enacted by the legislature of the State of Texas:

That the comptroller of the State be and he is hereby authorized to receive from the railroad companies in this State who are indebted to the special school fund all interest on their bonds that may now be or hereafter become due, provided the same is tendered in State bonds or in State treasury warrants previous to the meeting of the next regular session of the State legislature.

"SECTION 2. That for all sums so paid in the comptroller and treasurer shall issue to the special school fund the bonds of the State, bearing 6 per cent. interest.

"SECTION 3. This act to take effect from its passage."

Under like circumstances and for the same object the legislature of Texas passed an act entitled "An act amending an act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due or hereafter become due on their bonds," which act was approved May 28th, 1864, and is as follows:

"SECTION 1. Be it enacted by the legislature of the State of Texas: That the provisions of the act of which it is amendatory shall not apply to railroad companies that fail or refuse to receive State bonds or State treasury warrants at par for freight or passage at the prices of rates established by law."

455 SECTION 2. That whenever satisfactory evidence is produced or furnished to the comptroller of the State that any railroad company has failed or refused to receive the State bonds or State treasury warrants at par for freights or passage at the rates established by law, he is required to refuse to receive the State bonds or treasury warrants for the interest due by said railroad upon its bond.

SECTION 3. That the president of any railroad in this State be and he is hereby required to post in a conspicuous place in the railroad offices and in the passenger cars the provisions and terms of this act under the penalty of $100 to be recovered for the benefit of the State by suit before any court of competent jurisdiction upon information of any party.

SECTION 4. That all laws or parts of laws conflicting with this act be and the same are hereby repealed and that this act take effect from and after its passage."

Under similar circumstances attending the passage of each of the two acts just above recited and for the same purpose the legislature of the State of Texas passed an act entitled "An act to authorize railroad companies to discharge their indebtedness to the special school fund with the treasury warrants and bonds and coupons of the State," which act was approved and became a law November 16th, 1864, and is as follows:

"Be it enacted by the legislature of the State of Texas: That the railroad companies of this State that are indebted to the special school fund, shall continue to be allowed the privilege of paying the interest due said fund in the treasury warrants and bonds and coupons of the State; and may also discharge the whole or any part of the principal of their indebtedness to that fund (in the same manner), provided such railroad companies shall satisfy the comptroller that

the treasury warrants and bonds and coupons of the State are received by them at par with specie for freight and passenger travel.

That all treasury warrants and bonds and coupons of the State so received into the State treasury, shall be cancelled; and the comptroller shall issue the bonds of the State, bearing six per cent. interest to the special school fund for the amount so paid in; and this act shall take effect from its passage."

8. This defendant says that upon the passage of the above-recited act approved December 16th, 1863, and in reliance upon the agreement and obligation of the State evidenced thereby, and upon the pledge of the State thereby given to receive its bonds and treasury warrants from them and other railroad companies then indebted to the special school fund in payment of all interest on their bonds then or thereafter to become due under the conditions in said act specified the said Houston & Texas Central Railway Company and the said Washington County Railroad Company acquired for valuable and adequate considerations the so-called treasury warrants of the State of Texas referred to and specified in said act, intending to pay and tender to the comptroller of the State of Texas in payment of the interest on their indebtedness to the State of Texas on account of said special school fund loan within the time and upon the conditions specified in said act and did tender and pay the same to said comptroller upon the dates hereinafter specified. And upon the passage of the above-recited acts approved May 28th, 1864, and November 16th, 1864, and in reliance upon the agreement and obligations of the State evidenced thereby, and upon the pledge of the State thereby given to receive its bonds and treasury warrants from them and other railroad companies then indebted to the special school fund in payment of all interest on their bonds then or thereafter to become due as provided by the aforesaid act of May 28th, 1864, and upon the principal of said indebtedness as well, as provided by the aforesaid act of November 15th, 1864, and under the conditions in said act specified, the Houston & Texas Central Railway Company and the Washington County Railroad Company
456 each received said bonds and State treasury warrants at par for freight and passage at the rates then established by the law, and the presidents of each of said companies posted in a conspicuous place in the railroad office- and in the passenger cars of said companies the provisions and terms of the aforesaid act of May 28th, 1864, and satisfied the comptroller of the State that such treasury warrants and bonds and coupons of the State were so received by them at par with specie for freight and passenger travel, the sole inducement and consideration prompting said railroad companies to receive such treasury warrants at par for freight and passenger fare on their said railroads being the promise and agreement of the State of Texas evidenced by the aforesaid laws to receive the same in payment of the interest and principal of the aforesaid indebtedness of said companies to the State.

9. That having acquired the same for a valuable consideration, as hereinbefore stated, and having received the same, together with the bonds and coupons of the State at par, in payment for freight and

passenger fares of their respective railroads, the said Houston & Texas Central Railway Company, as it was authorized to do by the above-recited acts, tendered, delivered, and paid to the comptroller of the State of Texas, in payment of interest then due on its aforesaid indebtedness to the State of Texas, the following sums in the treasury warrants of the State of Texas upon the dates specified, to wit:

On January 20th, 1864,	the	sum	of	$23,466.76
" March 30, 1864,	"	"	"	6,670.00
" April 19, 1864,	"	"	"	15,009.92
" " " "	"	"	"	4,000.00
" July 13, 1864,	"	"	"	31,660.69
" August 20, 1864,	"	"	"	2,000.00
" " 24, 1864,	"	"	"	22,966.98
				$105,774.35

And the Washington County Railroad Company, as it was authorized to do by the above-recited acts, tendered, delivered, and paid to the comptroller of the State of Texas, in payment of interest then due on its aforesaid indebtedness to the State of Texas in the treasury warrants of the State of Texas, the sum of $12,755.41 on the 11th day of July, 1864, and the sum of $2,790.99 on the 25th day of August, 1864, and the sum of $3,880.80 on the 11th day of May, 1865, making a total of $19,427.20, and on the principal of its aforesaid indebtedness to the State of Texas the sum of $27,663.00 on the 11th day of May, 1865, each of which sums so tendered, paid, and delivered in such treasury warrants by the Houston & Texas Central Railway Company and by the Washington County Railroad Company, respectively, as aforesaid, were received and accepted by the comptroller and treasurer of the State of Texas as they were authorized and required by the above-entitled acts to do, and credit therefor was then and there duly given to said Houston & Texas Central Railway Company and to the Washington County Railroad Company, respectively, by the said comptroller and treasurer upon the books of their respective departments.

That upon the payment of the treasury warrants by said railway companies and the receipt thereof by the comptroller and treasurer, as aforesaid, the said warrants were cancelled as authorized and required by the above-recited acts, and thereupon the comptroller and treasurer, as required by the above-recited acts, issued the bonds of the State bearing 6 per cent. interest to the special school fund for the amounts so paid by said railway companies in such treasury warrants.

10. This defendant further says that by the passage of the above-recited acts entitled, respectively, "An act authorizing the comptroller of the State to receive from the railroad companies in this State the interest that there may now be due on their bonds," approved December 16th, 1863, and "An act amending an act authorizing the comptroller of the State to receive from the railroad companies in this State the interest that there may now be due or hereafter become due on their bonds," approved May 28th, 1864, and "An act to authorize rail

road companies to discharge their indebtedness to the special
457 school fund with the treasury warrants and bonds and coupons of the State," approved November 16th, 1864, for the purpose of paying its current expenses and to induce them to acquire such treasury warrants for a valuable consideration and in lieu of money for freight and passenger fares, thereby aiding in maintaining its credit, the State of Texas contracted and agreed with the said Houston & Texas Central Railway Company and with the Washington County Railroad Company, respectively, to accept and receive from them, upon the terms and conditions in said act specified and on said account, the treasury warrants of said State paid to the comptroller and treasurer of the State by said railroad companies on account of the principal and interest due upon said school fund loan, as hereinbefore alleged, and upon the acceptance of the terms and conditions of said act by each of said railroad companies, by acquiring for a valuable consideration and by receiving the State bonds and the State treasury warrants at par with specie for freight and passenger fares at the rates established by law and by satisfying the comptroller of the State that they had done so, as hereinbefore alleged, said acts immediately became and there was created a valid and binding contract by and between the State of Texas and each of said railway companies inuring to the benefit of this defendant that the State of Texas would receive as it did receive from each of said railway companies the treasury warrants of said State paid to it by each of said railway companies, as hereinbefore alleged, on account of the interest and principal due by them respectively upon said school fund loan, and would give as it did at the time give to each of said railway companies credit for the amount so paid in such warrants by them, respectively, upon principal and interest due upon said loan, as hereinbefore alleged, which contract, this defendant says, was within and in all respects entitled to the protection of article 1, section X, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts; and any act or law of the State of Texas or act of any officer or department of its government or any decision of any of its courts which denies or which may deny said railway companies and each of them and this defendant full credit for the sum and amount of such treasury warrants, as hereinbefore stated, and as paid by said railway companies on their said indebtedness on account of said school fund loan, this defendant alleges is contrary to and in violation of said provision of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts.

11. This defendant further says that the said treasury warrants paid by said railway companies, as hereinbefore alleged, on account of the principal and interest due by them respectively on their said indebtedness to the State of Texas for said school fund loan were made by them and accepted by the said State through its duly authorized officers without objection as valid and lawful payments, and for which said railway companies were entitled and for which they were given credit upon the books of the State of

Texas in pursuance of valid laws passed by said State in the exercise of its sovereign power, to which said railway companies and
458 all persons residing or being within its territory were subject and according to the laws of said State as then existing and expounded by the courts and all departments of the State government and as enforced by it and, as then actually enforced, observed in Texas, each of such payments in such treasury warrants were, when made, lawful and valid and were made by said railway companies and accepted by the State of Texas as lawful and valid; and when such treasury warrants were required and received by said railroad companies, as hereinbefore alleged, and by them paid to and received by the State of Texas without objection as just and lawful payments upon said indebtedness of said railroad companies to said State, and credit therefor was duly given by the State to said railway companies, the transaction with respect to such payments became executed and the State of Texas could not lawfully thereafter, as it never should in good conscience, dispute or question the validity of such payments and the right of said railway companies to the credit therefor then given by the State of Texas and to which said railway companies were lawfully and justly entitled.

And this defendant says furthermore that the State of Texas has since said demands were made and since the close of said civil war fully recognized and ratified the validity of such payments; that it has paid in full the bonds issued by the comptroller and treasurer to the special school fund for and in lieu of said payments made by said railway companies to and received by the State in treasury warrants, as hereinbefore alleged, and the said school fund has been thereby fully reimbursed for such payments so made in said warrants.

* * * * * * *

14. That by an act of the legislature of the State of Texas entitled "An act for the relief of railroad companies indebted to the State for loans from the special school fund," approved August 13th, 1870, it was, among other things, enacted that any railroad company then indebted to the State for loans from the special school fund might avoid the sale of its railroad for the non-payment of principal or interest by the payment into the treasury of the State on the first day of November, 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, 1870, and by the payment in addition on said first day of November of one per cent. upon said aggregate amount, to be applied towards the sinking fund provided for by the then existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest and one per cent. on account of said sinking fund semi-annually thereafter on the first day of May and November in each year, and also that the State of Texas would not exact of any railroad company not thereafter in default in respect to any of the payments required in said act the payment of the principal of the debt of said company except said payments on account of the sinking fund as aforesaid, but that any company might pay the same in full

at any time on 30 days' notice to the governor, and that the lien or mortgage in favor of the State securing such debt should not attach to any extention of its existing road thereafter constructed by any of said companies.

15. That on the 15th day of August, 1870, the legislature of the State of Texas passed, notwithstanding the veto thereof by the governor, in the manner and by the number of votes required by the constitution in order that the same should become a law, an act entitled "An act for the relief of the Houston & Texas Central Railway Company," whereby, among other things, it was enacted that the Washington County Railroad Company should thereby be made and declared to be to all intents and purposes in law a part of the Houston & Texas Central Railway Company and should be under the control and management of the Houston & Texas Central Railway
459 Company in like manner as every other part of said railway, and said Houston & Texas Central Railway Company should have the right to complete and extend that part of its railway theretofore known as the Washington County railroad from Brenham to the city of Austin, and should have and enjoy all the rights, privileges, grants, and benefits that there then or should at any time thereafter be secured to any railroad company in the State of Texas by any general law, etc.; and it was also by said act provided that for the whole amount of principal and interest due to the State by the Houston & Texas Central Railway Company and the Washington County Railroad Company on the 1st day of July, 1870, the governor of the State should accept and receive from the Houston & Texas Central Railway Company the 7 per cent. land grant, sinking fund, first-mortgage, gold, interest-bearing bonds of said company issued or to be issued by virtue of a deed of trust executed by said company July 1st, 1866, and maturing on July 1st, 1891, and which deed of trust Shephard Knapp and David S. Dodge, of New York, were named and accepted as trustees; and provided, further, that the governor should, after making the exchange of bonds in said act provided for, cancel and deliver to said railway company the six per cent. bonds of said Houston & Texas Central Railway Company and of the Washington County Railroad Company then held by the State for sums borrowed from school fund, being the same bonds now sued on by the State herein; and providing also that the settlement and exchange of bonds therein provided for should be made at any time agreed upon by the governor and said railway company prior to the first day of December, 1870, and also that in making the settlement therein provided for the Houston & Texas Central Railway Company should be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865 by said company and by the Washington County Railroad Company, upon the accounts of which said sums were respectively paid by said companies, and that said sums amounted in the aggregate to $152,864.55.

And this defendant says that the 7 per cent. bonds which said act required the governor to receive from the Houston & Texas Central Railway Company in exchange for the bonds of said rail-

way company and of the Washington County Railroad Company then held by the State for sums borrowed from the school fund were duly and properly tendered by said railway company to the governor as it was authorized to do by the said act prior to the first day of December, 1870, but the then governor, E. J. Davis, refused to accept said bonds so tendered and refused to surrender and deliver or permit to be surrendered and delivered to said Houston & Texas Central Railway Company, as it was his duty to do under the aforesaid act, the bonds of said Houston & Texas Central Railway Company and of the Washington County Railroad Company then held by the State for sums borrowed by them from the said special school fund, and said governor wilfully and wrongfully refused to perform the duties enjoined upon and required of him by the aforesaid act. But this defendant says, nevertheless, that said act entitled "An act for the relief of the Houston & Texas Central Railway Company" became and was a valid law of the State of Texas, and that thereby the State of Texas expressly recognized and acknowledged the validity of the payments theretofore made by said Houston & Texas Central Railway Company and said Washington County Railroad Company in treasury warrants of the State of Texas, as hereinbefore alleged, on account of their respective indebtedness for said school fund loan.

16. This defendant further says that the aggregate amount due by the Houston & Texas Central Railway Company on account of said loan, principal and interest, as said aggregate amount stood on the 1st day of May, 1870, and as said aggregate amount stood upon the books of the State of Texas after crediting said railway company, as was done on said books, with the amounts paid as aforesaid in State treasury warrants, was $551,550, being $432,000 principal and $119,550 interest instead of $657,324.35, as charged in plaintiff's petition herein, and the aggregate amount due by said Washington County Railroad Company on account of said loan, principal and interest, as said aggregate amount stood on the first day of May, 1870, and as said aggregate amount stood upon the books of the State of Texas after crediting said railroad company, as was done on said books, with the amounts paid, as aforesaid, in State treasury warrants, was only $49,800 and not the sum of $103,840.01, as alleged in plaintiff's petition herein.

460

17. This defendant further says that after the first day of May, 1870, and after the passage of the aforesaid acts of August 13th and 15th, 1870, and on, to wit, about the 1st day of November, 1870, A. Bledsoe, comptroller, with the concurrence and approval of E. J. Davis, the then governor of the State of Texas, wrongfully and unlawfully sought to deprive the said railway companies of the credit to which they were entitled for the payments made by them, as hereinbefore alleged, on their said indebtedness in treasury warrants of the State and wrongfully sought to repudiate such payments; and in pursuance of such wrongful and unlawful purpose said A. Bledsoe, as such comptroller, wrongfully and without any authority of law sought to recharge each of said railway companies respectively upon the books of the comptroller's office with the several amounts

paid by them respectively in treasury warrants, as hereinbefore alleged, thereby falsely stating the amount of said indebtedness due by said Houston & Texas Central Railway Company on May 1st, 1870, at $657,324.35 instead of $551,550, which last-named sum was the true aggregate amount as it stood on the first day of May, 1870, and falsely stating the amount of said indebtedness due by the Washington County Railroad Company on May 1st, 1870, at $103,840.01 instead of $49,800, which latter sum was the true aggregate amount of said indebtedness as it stood on the first day of May, 1870; and thereupon said E. J. Davis, as such governor, wrongfully and without lawful authority demanded that said Houston & Texas Central Railway Company should pay on the 1st day of November, 1870, six months' interest and one per cent. as a sinking fund on $657,324.35 instead of on only $551,550, which latter sum was the aggregate amount of
461 its indebtedness as said aggregate amount stood on the first day of May, 1870, and that the Washington County Railroad Company should pay six months' interest and one per cent. as a sinking fund on $103,840.01 instead of on only $49,800, which letter was the aggregate amount of its indebtedness as said aggregate amount stood on the first day of May, 1870, and that they should continue to pay into the treasury of the State six months' interest and one per cent. on account of said sinking fund semi-annually thereafter on the first day of May and November in each year; and upon the refusal of said railroad companies to comply with said wrongful and unlawful demand of said comptroller and governor the said E. J. Davis, as governor, threatened to proceed and was in fact proceeding to advertise and sell in the manner provided in the aforesaid act- of August 13th, 1856, and of August 13th, 1870, all the railroad property and franchises of each of the said railway companies on which a lien had been created to secure the payment of the aforesaid loans to them; and the said governor being by the aforesaid act- apparently clothed with the power to make such sale and thereby irreparably injure each of said companies by casting a cloud upon the title to their property and probably by having the same taken from them by force, and being without adequate relief — such unjust action of the State of Texas through its said governor, said railway companies were forced to yield and compelled to submit to his unjust and unlawful demands, as aforesaid, and to pay the amount then demanded by him. Such unjust and unlawful demand, accompanied with like threats, coercion, and duress, was repeated by said governor and by his successors on or about the first day of May and November in each year during the times hereinafter alleged, and said Houston & Texas Central Railway Company, in obedience to such unjust and unlawful demands, threats, and coercion, had been forced and compelled by the State of Texas to pay a two per cent. per annum sinking fund and six per cent. interest upon a computed aggregate amount wrongfully claimed, as aforesaid, by the State of Texas to be due by the Houston & Texas Central Railway Company on the first day of May, 1870, of $657,324.35 instead of $551,550, the true amount, and a two per cent. per annum

sinking fund and a six per cent. per annum interest on a computed aggregate amount claimed by the State of Texas to be due by the Washington County Railroad Company of $103,840.01 instead of $49,800, the just and true amount; and said railway companies each protested throughout and at the time of each payment filed its written protest with the proper officers of the State of Texas against the unlawful demand and exactions aforesaid only because the governors of said State threatened and declared their purpose to sell the property of said railway companies to satisfy the lien claimed to secure the indebtedness of said companies to the State of Texas and to seize and take from said railway companies their said railroads and property, and this defendant says that such threat and purpose would have been carried into effect by said State had not said railway companies submitted to such unjust and unlawful demands.

462 18. This defendant further says that in obedience to the unjust, unauthorized, and unlawful demand of the State of Texas, as hereinbefore alleged, said Houston & Texas Central Railway Company was compelled to pay on account of the aforesaid indebtedness and did under protest, as hereinbefore alleged, pay to the State of Texas the several sums of money on or about the several dates specified in the statement attached hereto marked "Exhibit A," and which this defendant asks to be taken as a part hereof with the same effect as though set forth at length herein, which payments were the 6 per cent. interest and 2 per cent. per annum sinking fund upon a computed aggregate amount due as of May 1st, 1870, of $657,324.35 instead of $551,550, the true amount of the indebtedness of said railway company to the State of Texas on the first day of May, 1870; and this defendant now here pleads each of such payments as shown, and avers that they are in full satisfaction and discharge of any and all indebtedness of the Houston & Texas Central Railway Company or of this defendant on account of said school fund loan and on account of the demand asserted by plaintiff's petition herein, and that neither said Houston & Texas Central Railway Company nor this defendant is indebted or liable to the State of Texas nor is the railroad or other property of this defendant in any way bound or charged with any lien or liability to the State of Texas for or on account of such loan.

19. This defendant further says that in obedience to the unjust, unauthorized, and unlawful demand of the State of Texas, as hereinbefore alleged, said Washington County Railroad Company or the Houston & Texas Central Railway Company, with which it was consolidated, was compelled to pay on account of the aforesaid indebtedness and did under protest, as hereinbefore alleged, pay to the State of Texas the several sums of money on or about the several dates specified in the statement attached hereto and marked "Exhibit B," and which this defendant asks to be taken as a part hereof with the same effect as though set forth at length herein, which payments were six per cent. interest and two per cent. per annum as a sinking fund upon a computed aggregate amount due as of May 1st, 1870, of $103,840.01 instead of $49,800, the true amount of the

indebtedness of said railway company to the State of Texas on the first day of May, 1870, and this defendant now here pleads each of such payments so shown, and avers that they are more than sufficient to fully pay off and satisfy and are $5,331.65 in excess of any amount which the State of Texas had any right to demand or exact on account of said loan or debt and on account of said school fund loan and on account of the demand asserted by plaintiff's petition herein, and neither said Washington County Railroad Company nor said Houston & Texas Central Railway Company, with which it was consolidated, as hereinbefore alleged, nor this defendant is indebted or liable to the State of Texas nor is the railroad or other property of this defendant in any way bound or charged with any lien or liability to the State of Texas for or on account of said loan.

20. That as and when each of such payments were made by said railway companies, as hereinbefore alleged and as shown by said Exhibits A & B, the same should have been applied, by reason of the facts hereinbefore alleged, to the payment of the six per cent. interest and a sinking fund on an aggregate indebtedness of the Houston & Texas Central Railway Company on account of said loan as such aggregate indebtedness stood on May 1st, 1870, of $551,550, and no more, and to the payment of six per cent. interest and a sinking fund on an aggregate indebtedness of the Washington County Railroad Company on account of said loan, as such aggregate indebtedness stood on May 1st, 1870, of $49,800, and no more, and this defendant is entitled to have said payments (if they have not been already) so applied, and by such equitable application this defendant says that the indebtedness of the Washington County Railroad Company to the State of Texas was more than discharged, as shown by Exhibit B, hereto attached, by the payment therein shown to have been made on the 1st day of May, 1879, and the indebtedness of the Houston & Texas Central Railway Company on account of said loan was more than discharged by the payment shown in exhibit to have been made on November 9th, 1893.

463 21. This defendant further says that the road-bed, track franchise and charter rights, and other property of the said Washington County Railroad Company and of the Houston & Texas Central Railway Company, which prior thereto had acquired by purchase or consolidation said Washington County railroad, described in plaintiff's petition, and on which plaintiff claims a lien in his said petition, were sold under certain decrees of foreclosure and orders of sale rendered by the circuit court of the United States in and for the eastern district of Texas and purchased by F. P. Olcott on or about the 8th day of September, 1888, who thereafter, as authorized by the laws of the State, organized this defendant under the general laws of Texas and conveyed to it all said property and rights, and by such sale and purchase this defendant acquired and now owns all lines of railway described in plaintiff's petition herein, together with the corporate rights, franchises, and privileges of said Houston & Texas Central Railway Company and of said Washington County Railroad Company, and possesses, operates, and maintains such lines of railway, with the extensions

thereof and additions thereto since made, and is entitled to exercise such corporate rights, franchises, privileges, and immunities.

22. This defendant says that by reason of all the facts hereinbefore alleged, the payment of such treasury warrants by said railway companies, in accordance with the valid laws of the State then existing and as recognized and enforced by all departments of the State; the acceptance of such warrants willingly and without objection by the State and the giving of credit therefor at the time by the State upon its books; the enjoyment of all the benefit of such payments by the State as fully as if the same had been made in lawful money of the United States; the extinguishment of the valid and just indebtedness of the State represented by said warrants by the cancellation of the same when received as such payments, and the full acquiescence and concurrence of the State at the time and for a long time thereafter of all the facts and circumstances attending such payments, as hereinbefore alleged, represent completed and executed transactions with respect to such payments which, this defendant says, the State of Texas cannot now lawfully and should not in good conscience attempt to repudiate.

23. This defendant further says that by the passage of the acts hereinbefore referred to, and especially by the passage of the acts entitled "An act authorizing the comptroller of the State to receive from the railroad companies in this State the interest that may now be due on their bonds," approved December 16th, 1863, and an act entitled "An act amending an act authorizing the comptroller of the State to receive from railroad companies in this State the interest that *they* may now be due or hereafter become due on their bonds," approved May 28th, 1864, and an act entitled "An act authorizing railroad companies to discharge their indebtedness to the special school fund with the treasury warrants and bonds and coupons of the State," approved November 16th, 1864, and an act entitled "An act for the relief of railroad companies indebted to the State for loans from the special school fund," approved August 13th, 1870, and an act entitled "An act for the relief of the Houston & Texas Central Railway Company," passed Aug. 15, 1870, and by the acceptance of the provisions of said act by said Houston & Texas Central Railway Company and by said Washington County Railroad Company, and especially by accepting the treasury warrants of the State in payment of freight and passenger fares on their respective railroads at par with specie, as required by
464 the aforesaid acts of May 28th, 1864, and November 15th, 1864, there was created a valid and binding contract by and between the State of Texas inuring to the benefit of this defendant as the successor of said companies and the present owner of the property, against which the plaintiff seeks to enforce a lien herein, whereby the State of Texas, for the valuable consideration apparent from the transaction, agreed and bound itself to receive, as it did receive, from each of said railway companies the treasury warrants of said State, and which were paid to it by each of said railway companies, as hereinbefore alleged, on account of interest and principal

due by them respectively upon said school fund loan, and that it would, as it did at the time, give to each of said railway companies credit for each of the amounts so paid by them, which contract this defendant says was within and in all respects is entitled to the protection of article 1, section X, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts, and which contracts this defendant says was, when made, valid and binding by the laws of the State of Texas as then existing and in force and as expounded by all departments of the State government and as administered by its courts of justice; and this defendant says that any constitutional provision, ordinance, resolution, or legislative enactment, if any there be, which directly or indirectly seeks or is intended to deprive this defendant of the benefit of such payments and credits, or seeks or is intended to authorize the State of Texas or any of its officers to violate or impair said acts or contracts, or abridge or impair any of the rights of this defendant accruing thereunder, or to recharge it with any of the payments, as hereinbefore shown, or any action of its officers or agents in any manner whatsoever in construction of such legislative enactments, or any decision by the courts of said State to the effect that this defendant is not or shall not be entitled to credit for the payments on account of said indebtedness made in treasury warrants of said State, as hereinbefore alleged, *this defendant says* are illegal, unauthorized, and void and have the effect or are intended by the State of Texas to have the effect of impairing the aforesaid contract or contracts, and are therefore violative of and contrary to article 1, section X, of the Constitution of the United States, providing in effect that no State shall pass any law impairing the obligation of contracts.

465 Your petitioners further say that afterwards, to wit, on November 16th, 1895, the plaintiff in said cause, The State of Texas, with leave of said district court of Travis county and as it was authorized to do by the laws of the State of Texas, filed its "first supplemental petition," wherein and whereby for the first time it showed by its statement of its own claim that its suit was one arising under the Constitution and laws of the United States, inasmuch as it then claimed and pleaded that the payments made, as aforesaid, by said railroad companies in State treasury warrants, which payments in connection with said admitted subsequent payments were sufficient to entirely discharge the said indebtedness and to leave no balance to be sued for, were null and void because made in treasury warrants which were alleged to constitute an emission of bills of credits, in violation of section 10, article 1, of the Constitution of the United States, and because said treasury warrants had been issued by the State of Texas under legislation passed while the State was at war with the United States and passed in aid of the so-called rebellion—that is, to assist in the prosecution of the then pending war between the Confederate States and the United States of America—and also because the money sued for was a special fund granted by the Congress of the United States for special purposes and could not be diverted by the legislature of the

State; that these grounds, upon which was based the right to demand repayment of the portion of the said indebtedness paid as aforesaid in treasury warrants, were presented by said first supplemental petition by way of demurrer to said first amended answer as matters appearing on the face of the legislation under which the said treasury warrants were issued and the use thereof in discharge of said indebtedness was authorized, and also by affirmatively alleging that said treasury warrants were issued to circulate as money and constituted bills of credit, in violation of section 10 of article 1 of the Constitution*al* of the United States and of a similar provision in the constitution of the State of Texas, and that said treasury warrants were issued and the legislation authorizing their issue and use was passed by the State of Texas to aid the so-called rebellion and to assist in the prosecution of the then existing civil war, as aforesaid.

466 Your petitioners further say that promptly after the filing of said first supplemental petition, on November 16th, 1895, to wit, on the same day, petitioner railroad company filed its application to remove the cause into the circuit court of the United States for the western district of Texas, and accompanied the same with a bond in form and amount and conditioned as required by law; that in said petition to remove the nature of said cause and the proceedings had were stated substantially as above, and it was further truthfully averred that the nature and only object and purpose of said suit was to set aside and avoid the payments in State treasury warrants, as aforesaid, by said railroad companies to the State on the bonds and former indebtedness described and referred to in the State's said original petition upon the grounds and for the reasons presented and set forth by the State in its said first supplemental petition, and that the State's right of action against petition- as defendant in said suit arose, if at all, under the Constitution and laws of the United States referred to and invoked by the State in its said first supplemental petition, and that the plaintiff's right of action and defendant's liability in said suit depend upon the construction of the Constitution and laws of the United States in their effect upon and application to the issues in said suit presented for the first time by and in said first supplemental petition filed as aforesaid; and it was further truthfully averred that the only pleadings filed in said suit by the plaintiff State were the said original and the said first supplemental petition, and that the fact that said suit arose under the Constitution and laws of the United States did not in any way appear from the said original petition or from plaintiff's statement of its claim in any manner until the filing by plaintiff of its said first supplemental petition, on November 16th, 1895, as before alleged, and until then the right of defendant to remove the cause into the Federal court upon the ground that it was a suit arising under the Constitution and laws of the United States or upon any other grounds whatsoever did not exist; and it was further truthfully averred in said petition to remove that the said suit had never been tried and no question therein had ever been determined in or by said district court, but that the same had

been continued or passed by consent of the parties without
467 trial and without ever having been called for trial and had not been called or set for trial at the then term of court, and that petitioner, as defendant in said suit, had not as yet been required by the laws of the State or by any rule of court to answer or plead to said first supplemental petition; that said petition to remove contained the usual formal averments of such a petition and closed with appropriate prayer to the said district court to proceed no further therein except to make the order of removal required by law and to accept the petition and bond and to cause the record to be removed into said circuit court of the United States in and for the western district of Texas.

And petitioners say that said application to remove the cause into the said circuit court of the United States was by said district court of Travis county refused and denied; to which ruling petitioner, railroad company, as defendant in said cause, excepted and reserved and took a bill of exceptions; that the said district court proceeded with the trial of said cause, and its action and ruling in denying said application to remove was on appeal therefrom, as aforesaid, affirmed by the said court of civil appeals by the judgment herein complained of, whereby petitioners say that said court decided against the title, right, privilege, and immunity so specially set up and claimed by petitioner under the constitution and statutes of the United States and commissions held and authority exercised under the United States.

Petitioners further say that after the denial of the application to remove, as aforesaid, the plaintiff State filed its first amended supplemental petition, setting forth substantially the same matters pleaded in its said first supplemental petition, and that in response to the said supplemental petitions petitioner railroad company filed its first supplemental answer, excepting to plaintiff's pleadings upon various grounds, not necessary to detail here, and by said supplemental answer it joined issue on all the allegations of plaintiff's said supplemental petition, and, by way of special pleas, denied that the treasury warrants used in making such payments were issued as bills of credit to circulate as money or in aid of the said rebellion, and averred that they were issued
468 in the exercise of the powers and in the performance of the duties conferred upon the comptroller of the State by the laws of Texas ever since its annexation to the United States and in the ordinary transactions of the business of the government and to pay appropriations duly made by the legislature for the ordinary and lawful purposes of the government, which governmental functions, duties, and powers were not destroyed or suspended by the secession of the State of Texas, in violation of the compact between the States embodied in the Constitution of the United States; and it was also averred in said supplemental answer that if it were true, as alleged by the State, that the treasury warrants used in making said payments were issued as bills of credit to circulate as money, in violation of the Federal and State constitutions, or were issued in aid of the rebellion they were so issued by plaintiff, The State of

Texas, and put in circulation by it among its citizens, who were induced and practically coerced by the State to accept the same, the State by its own act in waging war with the United States having driven out of circulation all money authorized by the Federal Constitution; that to permit the State to avail itself of the grounds of nullity alleged by it against the payments in question would be to allow it to deprive petitioner of its rights under the Constitution of the United States, including the free enjoyment of the monetary system and circulating medium established thereunder, and to profit by its wrongful act in so doing.

Petitioners say that the said district court of Travis county and the civil court of appeals denied and overruled all the defenses hereinabove referred to and gave judgment in favor of the State as prayed for; that the said district court of Travis county held that the treasury warrants and the payments made thereunder were null and void because they constituted bills of credit and were issued to circulate as money and because they were issued in aid of the rebellion, and the said civil court of appeals affirmed said judgment because it held that said treasury warrants were bills of credit issued to circulate as money, in violation of the State constitution; that this holding of the civil court of appeals was tanta-
469 mount to holding that the treasury warrants in question were issued in violation of the Constitution of the United States, because the prohibition in that Constitution against the emission of bills of credit was identical in legal effect with the prohibition in the State constitution against the issuance of treasury warrants to circulate as money and was the paramount law rendering the similar prohibition in the State constitution useless and unnecessary.

And the said district court by its judgment and the said court, of civil appeals by its judgment in this cause, contrary to subdivision 1 of section X of the Constitution of the United States, gave effect to and sustained the validity of the constitution of Texas adopted in 1869 and the statutes of Texas approved August 13th, 1870, as impairing the obligation of the contract previously entered into between the railway companies under which plaintiff- in error claims and the State of Texas under and by virtue of the aforesaid acts approved February 9th, 1861, December 16th, 1863, May 28th, 1864, and November 15th, 1864, and also sustained the validity of the action of the State of Texas through the comptroller and governor in canceling and discharging credits given for payments made by said railway companies under and in accordance with the said acts of 1861, 1863, and 1864, whereby plaintiffs in error were deprived of property without due process of law, contrary to section 1, article XIV, of the amendments of the Constitution of the United States; and the said courts by their said judgments decided against the validity of an authority exercised under the United States drawn in question in this cause and against the title, rights, privileges, and immunities specially set up and claimed by
470 plaintiffs in error under the Constitution and statutes of — an authority exercised under the United States and in favor of the validity of statutes of and authorities exercised under the State

of Texas drawn in question in this cause on the ground of their being repugnant to the Constitution and laws of the United States, and decided in favor of the validity of action of the State of Texas depriving plaintiff- in error of property without due process of law and sustaining the action of said State of Texas in taking the property of plaintiffs in error without due process of law and for public use without compensation, contrary to the Constitution of the United States.

Your petitioners refer to the assignments of errors filed herewith and pray that the same be considered for the purposes of this petition as a part hereof, and further pray that a writ of error may be allowed and issued herein to the said court of civil appeals in and for the third supreme judicial district of the State of Texas, which now has the record in said suit, for the removal of said cause into the Supreme Court of the United States, to the end that errors in said judgment and the proceedings in said cause may be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, and that the transcript of the record, proceedings, and papers in said cause, duly authenticated, may be sent to the said Supreme Court of the United States.

JOSEPH PAXTON BLAIR,
JAS. A. BAKER,
R. S. LOVETT,
Attorneys for Houston & Texas Central Railroad Company.
C. P. HUNTINGTON,
THOMAS H. HUBBARD,
W. D. CLEVELAND,
SAM. ALLEN,
C. LOMBARDI, *Petitioners.*

AUSTIN, TEX., *April 25th*, 1898.

Allowed with supersedeas upon furnishing bond in the sum one hundred thousand dollars, conditioned as the law directs.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals, Third Supreme Judicial District of Texas.

Filed in court of civil appeals, 3rd sup. jud. dist., Austin, Texas, April 26th, 1898.

R. H. CONNERLY, *Clerk.*

471 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of civil appeals in and for the third supreme judicial district of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals in and for the third supreme judicial district of the State of Texas, before you or some of you, being the highest court of the said State

in which a decision could be had in the said suit between Houston & Texas Central Railroad Company, appellant, and C. P. Huntington, Thomas H. Hubbard, W. D. Cleveland, C. Lombardi, and Sam. Allen, its sureties, and The State of Texas, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein a title, right, privilege, or immunity was claimed under the Constitution or a treaty or statute of or commission held or authority exercised under the United States and the decision was against the title, right, privilege, or immunity specially set up or claimed under such Constitution, treaty, statute, commission, or authority, a manifest error hath happened, to the great damage of said Houston & Texas Central Railroad Company and C. P. Huntington, Thomas H. Hubbard, W. D. Cleveland, C. Lombardi, and Sam. Allen, as by their complaint appears, we, being willing that error, if any hath
472 been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25 day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk Circuit Court of the United States,
Western District of Texas.

Allowed by—

H. C. FISHER,
Chief Justice of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas.

Filed in court of civil appeals, 3rd sup. jud. dist. of Texas, Austin, Texas, April 26th, 1898.

R H. CONNERLY, *Clerk.*

473 UNITED STATES OF AMERICA, *ss:*

To the State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals in and for the third supreme judicial district of Texas, wherein Houston & Texas Central Railroad Company and C. P. Huntington, Thomas H. Hubbard, W. D. Cleveland, C. Lombardi, and Sam. Allen are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 25th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas.

Received this citation at my office, in the city of Austin, Texas, on the 26th day of April, 1898, at 1 o'clock a. m., and executed the same by delivering to Charles A. Culberson, governor of the State of Texas, at Austin, Texas, on the 26th day of April, 1898, at 10 o'clock a. m., and to M. M. Crane, attorney general of the State of Texas, near Taylor, Texas, on the 26th day of April, 1898, at 2.30 o'clock a. m., each in person, a true copy of this citation.

GEORGE L. SIEBRECHT,
United States Marshal for the Western District of Texas,
By F. H. LANCASTER, *Deputy.*

Fees.

Service on governor	2.00
Service on att'y gen'l	2.00
No mileage	
Total	4.00

Filed in court of civil appeals, 3rd sup. jud. dist. of Texas, Austin, Texas, April 27th, 1898.

R. H. CONNERLY, *Clerk.*

Endorsed on cover: Case No. 16,890. Texas court of civil appeals, 3rd judicial district. Term No., 306. The Houston and Texas Central Railroad Company *et al.*, plaintiffs in error, *vs.* The State of Texas. Filed May 23, 1898.

No. 806, 81

FILED
JUL 11 1898
JAMES H. McKENNEY,
CLERK

Motion to advance.

No. 306

Filed July 11, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

WASHINGTON, D. C.

OCTOBER TERM, 1898.

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, C. P. HUNTINGTON, SAM ALLEN, THOS. H. HUBBARD, WM. D. CLEVELAND, AND C. LOMBARDI, PLAINTIFFS IN ERROR,

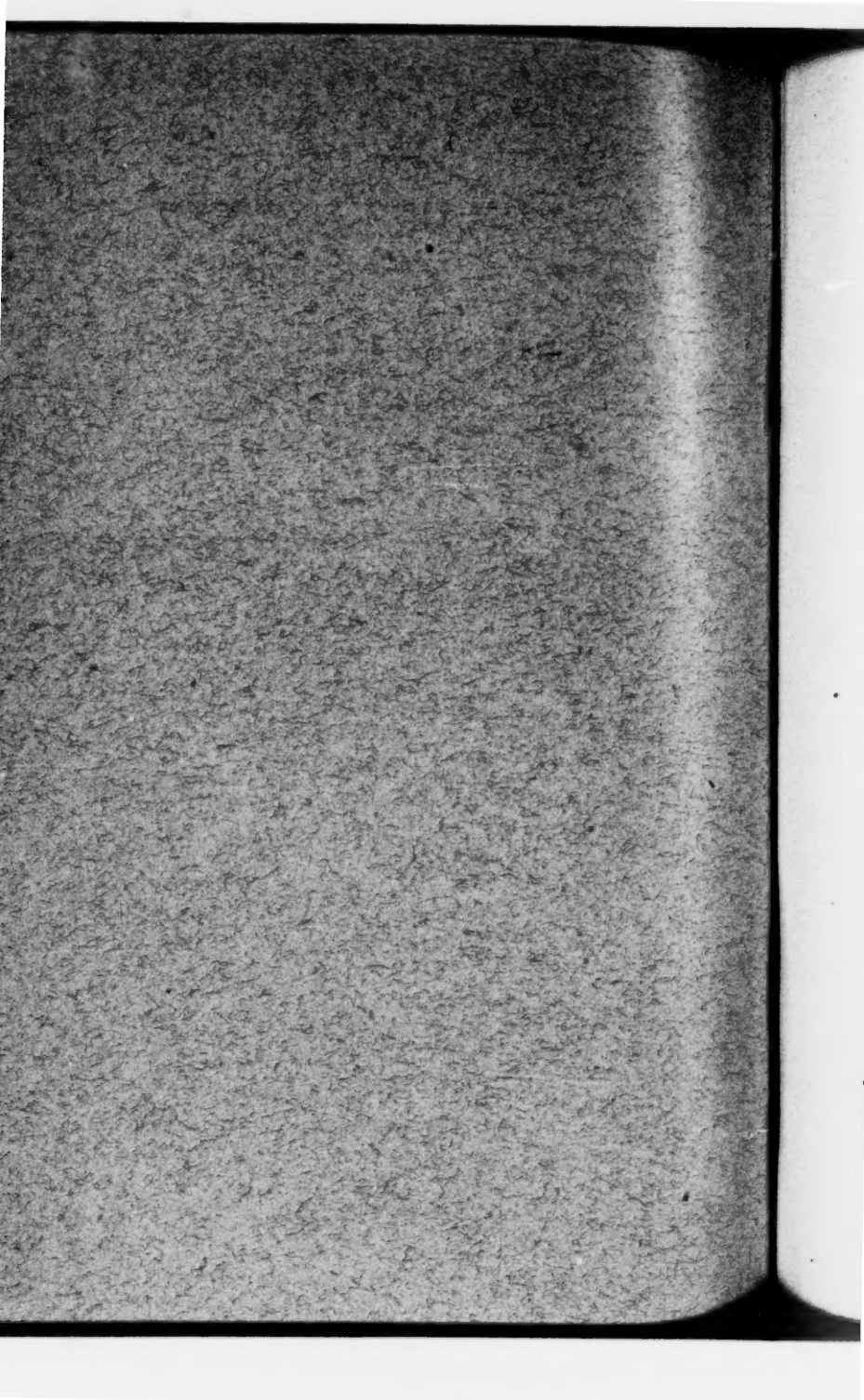
vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION TO ADVANCE.

EUGENE VON BOECKMANN PUB. CO., PRINTERS, AUSTIN, TEXAS.



No. .....

IN THE SUPREME COURT OF THE UNITED STATES.

WASHINGTON, D. C.

OCTOBER TERM, 1898.

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, C. P. HUNTINGTON, SAM ALLEN, THOS. H. HUBBARD, WM. D. CLEVELAND, AND C. LOMBARDI, PLAINTIFFS IN ERROR,

VS.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION TO ADVANCE.

To the Honorable, the Supreme Court of the United States:

This was a suit instituted in the State trial court by the State of Texas, as plaintiff, against the Houston & Texas Central Railroad Company, as defendant, for debt and foreclosure of lien on the property of the defendant, which resulted in a judgment in favor of the State of Texas and against the said Houston & Texas Central Railroad Company for the sum of six hundred seventy-three thousand one hundred and nine

dollars and fifty-six cents ($673,109.56), the same being the amount of principal and interest then due. Also a decree of foreclosure of the lien and the sale of the portion of the defendant company's railroad therein described.

From this judgment, the plaintiff in error appealed to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. This appeal resulted in an affirmance of the judgment against the said railroad company and C. P. Huntington, Thos. H. Hubbard, Wm. D. Cleveland, Sam Allen and C. Lombardi, sureties on its appeal bond. The plaintiffs in error applied to the Supreme Court of the State for a writ of error for the purpose of having that court review the judgment of the Court of Civil Appeals. The Supreme Court of Texas denied the writ of error. A writ of error was then granted bringing the cause to this court, assigning several errors herein, and a bond given superseding the judgment of the court below. The assignments, though in various forms, raise but two federal questions:

First, that the trial court erred in not removing the cause to the United States Circuit Court for the Western District of Texas.

Second, that the judgment involved a construction of the Constitution and laws of the United States which were decided adversely to the plaintiffs in error.

Neither of these contentions is well founded. The statement of plaintiff's cause of action was, in substance and effect, that it was a suit for a debt evidenced by written obligations in the form of bonds, evidencing a loan of the special school fund of Texas to the railroad companies therein named, and the existence of a lien on the companies' property, foreclosure of which was asked. (Tennesse vs. Bank, 152 U. S. 455-464.) The defence of the plaintiff in error company was that it had paid the debt for which this suit was brought, in treasury warrants of the State of Texas. The Court of Civil Appeals held in affirming the judgment of the court below that the warrants in which these payments were made were issued for the purpose of being circulated as money, and were therefore void be-

cause prohibited by the Constitution of the State of Texas. The language of the Court of Appeals on that subject is as follows:

"The second and principal question which arises is whether the payments made by the railway companies in State treasury warrants are valid and binding upon the State. This question presents really the only controversy between the parties. Section 8, Article VII, of the Constitution of 1845, states that in no case shall the Legislature have power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money. The warrants which were paid upon the obligations due the State were issued under acts of the Legislature of the State when that provision of the Constitution was in force. The various acts of the Legislature of the State during the period of the war concerning the State revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used, and the amount for which they could be issued, together with the size, shape and color of the warrants issued, and the small amounts in which the warrants were issued, together with the history of the times and the well-known depleted condition of the State treasury during that period, together with the scarcity of existing, reliable and available circulating medium as money, convinces us that it was the purpose of the various acts of the Legislature during that time to give to the warrants issued during that period, as much as possible a standing and character as money. The scarcity of money and the necessities of the State and the public were evidently inducements to the Legislature sitting during this period to provide uses to which warrants might be put in the way of requiring State officers and authorizing railways to receive them in payment of debts due them. The evident purpose was to give to the warrants in certain instances a debt-paying power in order that they might be given an advanced value and could be used in some respects as money. When the warrants were issued it was not expected and intended that they would be immediately paid, for the State was not then in financial condition to pay them; nor was the intention solely that they should serve the legal purpose of evidence of debt against the State. But the character of the legislation during the period of the war clearly indicates that the purpose was to give to these warrants the added quality of money as far as it lay in the power of the Legislature to accomplish that result. To set out all the acts of the Legislature bearing upon this subject, together with all the facts which we have considered in connection therewith, with the well-known matters of history relating thereto, would unnecessarily prolong this opinion. Therefore, we close this branch of the case with the statement that in our opinion the warrants of the State issued

during the period of the war, after January 1, 1862, were intended to be used and circulated as money, and in this connection it is well to say that we are of the opinion from all that is shown by the record, together with the various acts of the Legislatures during that time, that the payments made in warrants by the railway companies upon the obligations sued upon were in warrants issued after the time we have declared they were intended to circulate as money. What is said in this connection relieves us from passing upon the interesting questions presented in the briefs upon the burden of proof with reference to the alleged payments." (Houston & Texas Central Railroad Company vs. State of Texas, 41 Southwestern Reporter, 157.)

This ground being broad enough upon which to rest a judgment, a decision of the federal question involved became immaiteral. Egan vs. Hart, 165 U. S. 188-191.

The State of Texas, defendant in error, therefore, moves this court to advance this cause upon the docket of the court, and set same down for hearing for as early a date as the convenience of this court will permit. And in this connection, plaintiff in error would respectfully suggest that the cause be set for some date not later than December 1st, 1898:—

1. Because the State of Texas is a party to the suit.

2. Because the supersedeas bond practically enjoins the State from collecting its school fund necessary for the operation of its schools.

3. Because it is believed that this court has no jurisdiction of the case, and that the decision on this point should be given at the earliest possible date.

4. Because the case affects matters of general public interest to the people of Texas.

5. Because it is one of special and peculiar circumstances, such as to justify its advance under the rules of this court.

Defendant in error would further show that R. S. Lovett, Esq., and Jas. A. Baker, Esq., of Houston, Harris County, Texas, and Joseph Paxton Blair, of the City of New Orleans, in the State of Louisiana, are counsel for plaintiffs in error, upon whom service hereof is asked to be made.

M. M. Brown ..... Att'y Gen'l,

Attorney for the State of Texas, Defendant in Error.

Issuance and service of notice hereof is hereby waived by plaintiffs in error and it is agreed that this memorandum may be accepted as a substitute therefor.

Joseph Paxton Blair

Jas. A. Baker

Robert. S. Lovett

Attorneys for plaintiff in error.

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN G. CARLISLE,
R. S. LOVETT,
J. P. BLAIR,
MAXWELL EVARTS,
Of Counsel for Plaintiffs in Error.

G. A. Hamerton, Printer and Custom House, N. Y.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 81.

THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY ET AL.,
Plaintiffs in Error,

vs.

THE STATE OF TEXAS,
Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

The State of Texas, by an Act of the Legislature approved November 25, 1850 (printed in Appendix to Brief, p. 1), accepted the proposition

made to it on the part of the Government of the United States and contained in the Act of Congress approved September 9, 1850 (9 Stat. at Large, 446), and agreed to take "ten millions of dollars in a stock bearing five per cent. interest and redeemable at the end of fourteen years, the interest payable half-yearly at the Treasury of the United States" in compromise and settlement of the controversy respecting the Northwestern or New Mexico boundary line.

Thereafter and by an Act of the Texas Legislature, approved January 31, 1854, and entitled "An Act to Establish a System of Schools" (General Laws of 1854, p. 17. See Appendix to Brief, p. 4 *et seq.*), $2,000,000 of the stock above mentioned were set aside and designated as a "Special School Fund," as distinguished from the "Perpetual School Fund" provided for by Section 2, Article X., of the Constitution of 1845.

On August 13, 1856, the Legislature passed an act entitled "An Act to Provide for the Investment of the Special School Fund in the Bonds of Railroad Companies Incorporated by the State" (Gen. Laws 1856, p. 31), by which the Governor, Comptroller and Attorney-General of the State of Texas were constituted a Board

of School Commissioners, whose duty it was, under regulations and restrictions prescribed by the act, to invest the "Special School Fund" created by the Act of January 31, 1854. This Act of August 13, 1856, is printed in full in the appendix to this brief at pages 11 to 17.

In accordance with the provisions of the Act of August 13, 1856, and prior to the year 1860, the State from time to time loaned to the Houston and Texas Central Railway Company and to the Washington County Railroad Company portions of the "Special School Fund" amounting in the aggregate to the sum of $450,000 (Record, p. 7) and the sum of $66,000 respectively (Record, p. 7).

In 1870 the railroad and other property of the Washington County Railroad Company were purchased by and became a part of the system of the Houston and Texas Central Railway Company, the two companies being in effect consolidated (Rec., p. 96).

All the property of the Houston and Texas Central Railway Company and the Washington County Railroad Company as thus consolidated was sold in 1888 under foreclosure proceedings and the purchasers under the foreclosure sale

organized under the general laws of Texas the Houston and Texas Central Railroad Company, the plaintiff in error, which company now owns all the lines of railroad and property included in and covered by the lien in favor of the State to secure the School Fund loans originally made by it to the Houston and Texas Central Railway Company and to the Washington County Railroad Company (Record, p. 20).

The railroad companies, under which the plaintiff in error claims, paid the interest and sinking fund maturing upon the loans made to them from the "Special School Fund" by the State of Texas as aforesaid, as required by the act under which the loans were made, until prevented by the Civil War commencing April 12, 1861 (Record, p. 8).

On the 9th day of February, 1861, the Legislature of Texas passed an act authorizing the Board of School Commissioners to receive treasury warrants in payment of the two per cent. for sinking fund payable by railroad companies in whose bonds the "Special School Fund" had been invested (General Laws Extra Session 8th Legislature, p. 19; see Appendix to Brief, p. 18).

It is important to observe that the act just

referred to was passed before the commencement of the Civil War.

Afterwards, and on the 11th day of January, 1862, the Legislature of Texas passed an act entitled "An Act for the Relief of Certain Railroad Companies in the State of Texas," which provided "that the payment of all interest due and to become due on the bonds issued by the several railroad companies in the State of Texas for loans from the Special School Fund be * * * extended until the 1st day of January, 1864" (General Laws of Texas, 9th Leg., p. 37; see Appendix to Brief, p. 19).

Before the expiration of the time limited by the Act of January 11, 1862, for the payment of interest and sinking fund upon the loans from the Special School Fund, an act was passed by the Legislature of Texas on the 16th December, 1863, as follows:

> "SECTION 1. Be it enacted by the legislature of the State of Texas: That the comptroller of the State be, and he is hereby, authorized to receive from the railroad companies in this State who are indebted to the special school fund, all interest on their bonds that may now be or hereafter become due, provided the same is tendered in State

bonds or in State treasury warrants, previous to the meeting of the next regular session of the State legislature.

"SECTION 2. That, for all sums so paid in, the comptroller and treasurer shall issue to the special school fund the bonds of the State, bearing 6 per cent. interest.

"SECTION 3. This act to take effect from its passage" (Gen. Laws of Texas, 10th Legislature, p. 37).

Afterwards, and on the 28th day of May, 1864, the Act approved December 16, 1863, was amended to read as follows:

"SECTION 1. Be it enacted by the legislature of the State of Texas: That the provisions of the act of which it is amendatory shall not apply to railroad companies that fail or refuse to receive State bonds or State treasury warrants at par for freight or passage at the prices or rates established by law.

"SECTION 2. That whenever satisfactory evidence is produced or furnished to the comptroller of the State that any railroad has failed or refused to receive the State bonds or State treasury warrants at par for freights or passage at the rates established by law, he is required to refuse the State bonds or treasury warrants for the interest due by said railroad upon its bond.

"SECTION 3. That the president of any railroad in this State be, and is hereby, re-

quired to post in a conspicuous place in the railroad offices and in the passenger cars the provisions and terms of this act under a penalty of $100 to be recovered for the benefit of the State by suit before any court of competent jurisdiction upon information of any party.

"SECTION 4. That all laws or parts of laws conflicting with this act be, and the same are hereby, repealed, and that this act take effect from and after its passage." (Gen. Laws of Texas, 10th Leg., Called Session, p. 9.)

In the autumn of the same year—to wit, on the 15th of November, 1864—the Texas Legislature passed another act authorizing the railroad companies to discharge their indebtedness to the "Special School Fund" in treasury warrants. We give the act as follows:

"Be it enacted by the legislature of the State of Texas: That the railroad companies of this State that are indebted to the special school fund shall continue to be allowed the privilege of paying the interest due said fund in the treasury warrants and bonds and coupons of the State; and may also discharge the whole or any part of the principal of their indebtedness to that fund (in the same manner) provided such railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par

with specie for freight and passenger travel.

"That all treasury warrants and bonds and coupons of the State, so received into the State treasury, shall be canceled; and the comptroller shall issue the bonds of the State, bearing six per cent. interest, to the special school fund for the amount so paid in; and this act take effect from its passage." (Gen. Laws of Texas, 10th Leg., Second Extra Session, p. 14.)

In pursuance of these three Acts of the Legislature of December 16, 1863, May 28, 1864, and November 15, 1864, the Houston and Texas Central Railway Company and the Washington County Railroad Company each received State treasury warrants at par for freight and passage upon the lines of their respective railways at the rates then established by law, and in compliance with the terms of said acts the presidents of each of said companies posted in a conspicuous place in the railroad offices and in the passenger cars of said companies the provisions and terms of the said Act of May 28, 1864 (Record, p. 11).

During the year 1864 the Houston and Texas Central Railway Company paid the sinking fund and the interest then due by it with the treasury warrants of the State as authorized by the said Acts of the Texas Legislature, the aggregate

amount of the payments made by it during said year being $105,774.35 (Record, pp. 115–126). The Washington County Railroad Company during the years 1864 and 1865 paid with the treasury warrants of the State of Texas the sinking fund and interest due by it, amounting in the aggregate to the sum of $47,090.20 (Record, pp. 127–131).

The treasury warrants so paid by the said railroad companies were received by the State of Texas in full satisfaction and payment of the interest and sinking fund due from them at the time of payment, and credit therefor was given said railway companies by the State Comptroller and Treasurer upon the books of their respective departments and the warrants were canceled as required by said acts, and the Comptroller and Treasurer of the State of Texas thereupon, as required by law, issued the bonds of the State, bearing six per cent. interest to the "Special School Fund" for the amounts so paid by the railway companies in such treasury warrants (Record, p. 12).

In other words, the State of Texas agreed to receive from the railway companies, whose properties are now owned by the plaintiff in error, treasury warrants in payment of the principal

and interest upon the loans made to them by the State from the "Special School Fund," if said railroads would receive said "State treasury warrants at par for freight or passage at the prices or rates established by law." The railway companies accepted the offer of the State, and did receive treasury warrants at par for freight and passage upon their lines of railroad. The State, as it agreed to do, thereupon received from said railway companies treasury warrants in payment of the interest and sinking fund due upon the loans from the "Special School Fund," and gave the companies credit therefor upon the books of the Comptroller and Treasurer of the State. That is to say, there was a complete executed contract between the State of Texas and the Houston and Texas Central Railway Company and the Washington County Railroad Company. The offer made by the State was accepted by the railway companies, and the State fully performed its part of the contract by giving the railway companies credit in its loan account against them for the amount paid by them in treasury warrants. Nothing remained to be done by either party to the contract, and the rights of the railway companies resulting

from the execution of the contract—viz., the credits given them upon their indebtedness to the State arising from the loans out of the "Special School Fund"—were complete and vested.

The railroad companies of the State after the war, and prior to 1870, were unable, as a result of the war, to pay the sinking fund and interest accruing after the payments made by them in treasury warrants, and on August 13, 1870, the Legislature passed a General Act which provided " that any railroad company indebted to the State for loans from the Special School Fund may avoid the sale of its railroad for the non-payment of principal or interest by the payment into the treasury of the State on the first day of November, A. D. 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870, and by the payment in addition on said first day of November of one per cent. upon said aggregate amount to be applied toward the sinking fund provided for by existing laws in respect to said loans," and by making a similar payment on the 1st day of May and November in each year thereafter until the

entire loan had been paid (Gen. Laws of Texas 1870, page 85; see Appendix to Brief, p. 20).

It is not entirely clear from the record just when the accounts between the railroad companies and the State were restated, and the railroad companies recharged with the amounts which they had paid in treasury warrants and for which they had received credit upon the books of the State. In the opinion of the trial Court it was said that the accounts had been restated on May 1, 1870, and that the Act of August 13, 1870, referred to the condition of the accounts as restated. To quote the words of the District Judge, "if a contrary construction of this Legislature is to be adopted, it must be assumed that the accounts were restated and the railroads recharged with the payments made in treasury warrants on May 1, 1870, as that is the date of the entries on the books, and as there is no other evidence of the date of restating these accounts. Hence, the acts mentioned may have referred to the condition of the accounts after they were restated" (Record, p. 68). The trial Judge also found as a fact "that said payments in treasury warrants were charged off the account, and the account of

the State with the defendant railroad company was restated May 1, 1870, so as to ignore said payments in treasury warrants" (Record, p. 71).

Whether the view of the State District Court that the accounts between the railroad companies and the State had been restated on May 1, 1870, is correct, or whether such accounts were restated after the passage of the Act of August 13, 1870, would not seem to be particularly material in the determination of this case. It is, however, certain that when the railroad companies offered to make the first payment under the Act of August 13, 1870—to wit, on November 1, 1870—the Comptroller of the State of Texas, with the concurrence and approval of the Governor thereof, falsely stated the amount of the indebtedness due by the Houston and Texas Central Railway Company on the 1st of May, 1870, at $657,324.35, instead of $551,550, which last-named sum was the true aggregate amount then due on the loans to said railway company from the Special School Fund; and the amount of the indebtedness due by the Washington County Railroad Company on May 1, 1870, at $103,840.01 instead of $49,800, which latter sum was the true aggregate amount of said indebtedness

as it stood before the accounts between the railroads and the State of Texas were restated, and the amount of each indebtedness, as stated by said Comptroller, could only be computed by recharging each of said railway companies with the several amounts paid by them in treasury warrants and canceling the credit which had theretofore been given them by reason of such payments (Record, p. 17).

Thereupon the said Governor of the State of Texas demanded that the Houston and Texas Central Railway Company should pay on the 1st day of November, 1870, and on the first day of May and November in each year, thereafter, six months' interest and one per cent. as a sinking fund on $657,324.35, instead of on only $551,550, and that the Washington County Railroad Company should pay on the 1st day of November, 1870, and on the 1st day of May and November in each year, thereafter, six months' interest and one per cent. as a sinking fund on $103,840.01 instead of on only $49,800, which latter sum was the true aggregate amount of its indebtedness upon the school-fund loan as it stood on the 1st day of May, 1870; and, upon the refusal of said railway companies to accede to the said demands

of the Comptroller and Governor of the State of Texas, the Governor threatened to proceed and in fact did proceed to advertise and sell in the manner provided by the Acts of August 13, 1856 (see Appendix, p. 11 *et seq.*), and of August 13, 1870 (see Appendix, p. 20), all the railroad property and franchises of each of said railway companies on which a lien had been created to secure the payment of the aforesaid loans to them (Record, pp. 17 and 18). The said railway companies, being without adequate relief against this threatened action of the State of Texas through its Governor, were forced to yield and compelled to submit to its unjust demands, and the said Houston and Texas Central Railway Company was forced and compelled by the State of Texas to pay a two per cent. per annum sinking fund and six per cent. interest upon a computed aggregate amount wrongfully claimed by the State of Texas to be due by said railway company on the 1st day of May, 1870, of $657,324.35 instead of $551,550, the true amount, and the Washington County Railroad Company was compelled to pay a two per cent. per annum sinking fund and a six per cent. per annum interest on a computed aggregate amount claimed by the State of Texas

to be due by said railroad company of $103,-840.01 instead of $49,800, the just and true amount then due. At the time of each of said payments by said railroad companies of said sinking fund and interest, there was filed a written protest with the proper officers of the State of Texas against such unlawful demand and exaction (Record, p. 134).

In obedience to such unlawful demands of the State of Texas the Houston and Texas Central Railway Company was compelled to pay the amount of $975,356.21 (Record, p. 22) and the Washington County Railroad Company the amount of $68,738.30 (Record, p. 22), and the said railway companies claimed that such payments of said amounts were in full satisfaction and discharge of any and all indebtedness on their part to the State of Texas on account of said school-fund loans to them. The last payment made by either of said railway companies on account of said sinking fund and interest was made by the Houston and Texas Central Railway Company on the 9th of November, 1893 (Record, p. 22).

Thereafter, and on or about the 8th of December, 1894, the State of Texas filed its original petition against the Houston and Texas Central

Railroad Company in the District Court of Travis County, Texas, to recover a balance alleged to be due upon a loan of a part of the Special School Fund made by the State of Texas to the Houston and Texas Central Railway Company and the Washington County Railroad Company and to foreclose the lien, provided by the statutes of the State under which the loans were made, upon the property formerly owned by those companies and now owned by their successor the Houston and Texas Central Railroad Company (Record, p. 1). The theory upon which this suit was based was that the said railroad companies were not entitled to any credit for the amounts paid by them in pursuance of the provisions of the Acts of the Legislature of Texas approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, and that a proper construction of the Act of August 13, 1870, required that the amount due upon said school-fund loans to said railway companies on the first day of May, 1870, should be computed by canceling and disregarding the payments by said railway companies in treasury warrants under the provisions of said Acts of 1861, 1863 and 1864.

An answer to this petition was filed by the

defendant on the 15th of May, 1895, in which it was claimed that the executed contract between the State of Texas and the Houston and Texas Central Railway Company and the Washington County Railroad Company, arising under the said Acts of the Texas Legislature of 1861, 1863 and 1864, was within the protection of Article I., Section X., of the Constitution of the United States, and that its obligation could not be impaired by any act of the Legislature of the State of Texas (Record, p. 21), and that said defendant company had been deprived without due process of law of its property; viz., the credit given to it by the State of Texas at the time of the payment of the school-fund loan in treasury warrants under the terms of the said Acts of 1861, 1863 and 1864 (Record, p. 5).

The State of Texas thereupon filed what is called its "First Supplemental Petition" and alleged:

(1) That the acts of December 16, 1863, May 28, 1864, and November 15, 1864, were null and void in this:

> "That they specifically attempted to authorize the destruction and diversion of a special fund given to the State of Texas by the Federal Congress for special purposes and by previous act of the legislature set apart as the special school fund, and that

> the said public schools of Texas had a vested right in said fund, and that the legislature had no subsequent authority to destroy said fund" (Record, p. 24).

(2) That the treasury warrants in which the railroad companies "did pay a portion of the debts" were null and void.

> "Because said warrants were bills of credit emitted by the State and therefore violative of Section 10, Article 1, of the Constitution of the United States" (Record, p. 25).

In the prayer of this first supplemental petition it was asked that the credit given to the railroad companies upon the books of the State for the treasury warrants should be canceled and discharged, and there arose under such petition for the first time and as part of the plaintiff's case a controversy under the Constitution and laws of the United States (Record, p. 24 *et seq.*).

Immediately upon the filing of said first supplemental petition by the State of Texas setting up such controversy under the Constitution and laws of the United States the defendant company filed a petition with a good and sufficient bond praying the removal of the cause to the Circuit Court of the United States for the Western District of Texas (Record, p. 30 *et seq.*).

The application was made upon the ground that the suit was one arising under the Constitution and laws of the United States, as appeared from the plaintiff's own pleadings and statement of its own case. The application to remove the cause was denied by the Court, and the defendant duly excepted thereto (Record, p. 38).

After the denial of the motion to remove the case to the United States Circuit Court for the Western District of Texas there were various pleadings filed by both parties, the case was tried without a jury, and a judgment was entered therein on the 29th of February, 1896, in favor of the State of Texas for the sum of $673,109.56 (Record, p. 73), and a lien was declared upon the entire line of railroad and appurtenant property owned by said company and upon its corporate rights and franchises, and the same was foreclosed and said property ordered to be sold to satisfy said judgment (Record, p. 74).

There was no conflict in the evidence, and the facts established were substantially as follows:

FIRST. It was admitted that the loans were made originally and the bonds therefor executed as alleged in the State's original petition (Record, p. 96).

SECOND. The consolidation of the Washington County Railroad Company with the Houston and Texas Central Railway Company prior to 1870 was admitted (Record, pp. 96, 97), and it was also shown that plaintiff in error, the Houston and Texas Central Railroad Company, was incorporated August 1, 1889, under the General Laws of Texas, by the purchasers of the railways of the Houston and Texas Central Railway Company and Washington County Railroad Company at foreclosure sale (Record, p. 97).

THIRD. Each and all of the payments on account of the loans described in plaintiff's petition, and pleaded in the answer of the defendant, were shown to have been made as therein alleged, including the payments made in treasury warrants (Record, pp. 115–134).

FOURTH. It was shown that the payments made by said companies in treasury warrants, as pleaded by defendant, were accepted by the Comptroller and Treasurer of the State, and that credit therefor was at the time duly given by the Comptroller on the books of his department (Record, pp. 115–134).

FIFTH. It was shown that the aggregate amount due, as said aggregate amount stood on

the first day of May, 1870, on the books of the State of Texas, on account of the loans described in plaintiff's petition, were the balances remaining after allowing said companies credit for all amounts theretofore paid by them, as pleaded in the answer of the defendant, including the amounts paid as therein alleged, in State treasury warrants, and not the amount alleged in the State's petition as the balance due May 1, 1870 (Record, pp. 115–117 and 127, 128).

SIXTH. It was shown that by allowing credit for the payments in treasury warrants, as pleaded by defendant, and shown to have been made as alleged by it, as well as for the other payments therein pleaded, the entire indebtedness declared upon in the State's original petition was satisfied and discharged, and that, disregarding such payments in treasury warrants, and disallowing credit therefor, there would be due the State the amount claimed to be due as the balance of such indebtedness, as alleged in the State's petition (Record, pp. 115–117 and 127, 128). This is a matter of calculation from the statements of the Comptroller (Record, pp. 115–134).

SEVENTH. The payments subsequent to May 1, 1870, were exacted by the Comptroller and

Governor without regard to the payments theretofore made in treasury warrants, and as if no such payments had been made, and on a basis of the indebtedness without allowing credit for such payments, and each of the payments so exacted was made under protest, and notice of protest in writing was filed with the Comptroller at the time of each payment (Record, pp. 134, 135).

EIGHTH. It was shown that the six per cent. bonds of the State, issued by the Comptroller and Treasurer under the provisions of the aforesaid Acts of December 16, 1863, May 28 and November 15, 1864, to and for the benefit of the "Special School Fund," for the amounts paid under said acts by railroad companies on account of their indebtedness to said "Special School Fund," were paid, principal and interest, to the School Fund in August, 1883, out of the general revenue of the State, and in pursuance of an Act of the Legislature approved February 15, 1883 (Record, p. 188).

NINTH. It was shown that there was, at the time of the trial, in the basement of the Comptroller's Office in the Capitol Building at Austin, a large number of canceled treasury warrants

purporting to have been issued during the war, —some for civil service and others for military service—but there was nothing whatever on them, or on the records of the Comptroller's Office, to indicate, and no evidence was offered to show in any way, how they came into the custody of the Comptroller, or when or from whom or for what purpose they were received at the Comptroller's Office (Record, pp. 179–184).

TENTH. It was shown that there was nothing on the books or records of the Comptroller's or Treasurer's department of the State showing the date, denomination or character of any of the treasury warrants paid by said companies or used by them in making the payments shown to have been made by them in State treasury warrants on account of the loans described in plaintiff's petition, and nothing to show whether such warrants were issued before or after the commencement of the war in 1861, or, if after that time, whether they were issued for civil or military purposes, or the form, denomination or character of the warrants used in making the payments (Record, p. 184). Nor were any of such facts shown by any of the books, records or papers of the defendant, or by

books, records or papers in its possession or accessible to it (Record, p. 185).

An appeal was duly taken from the judgment of the trial Court to the Court of Civil Appeals for the Third Supreme Judicial District, and on the 9th day of June, 1897, the judgment was reformed so as to foreclose the lien only upon that part of the company's railroad which was in existence on August 13, 1870, together with all other property in connection therewith, such as depots, etc., and the franchises of that part of the road. A sale thereof was ordered to satisfy the amount of the judgment, but without rendering any judgment against the railroad company individually or personally for the amount of said debt. As thus reformed the judgment of the trial Court was affirmed (Record, p. 217).

A motion for a rehearing was thereafter duly made (Record, p. 219) and denied, whereupon an application was made to the Supreme Court of Texas for a writ of error, which was also denied. A motion for rehearing in the Supreme Court of Texas of the application for a writ of error, together with a motion to argue the application orally, was thereupon made and denied (Record, p. 272).

The case was then brought to this Court by a writ of error to the Court of Civil Appeals for the Third Supreme Judicial District for the State of Texas, under the provisions of Section 709 of the United States Revised Statutes (Record, p. 314).

Assignment and Specification of Errors.

FIRST. The District Court of the State of Texas in and for Travis County erred in refusing the application of the Houston and Texas Central Railroad Company, one of the plaintiffs in error herein, to remove this case into the Circuit Court of the United States for the Western District of Texas, and in holding that said District Court was authorized to proceed with this cause after the presentation of the petition and bond for such removal.

SECOND. The said Court of Civil Appeals erred in overruling and holding not well taken said plaintiff in error's first assignment of error complaining of the action and ruling of the said District Court in refusing its application to remove this cause into the Circuit Court of the United States for the Western District of Texas, and in holding that said District Court was authorized to proceed with this cause after the presen-

tation of the petition and bond for such removal.

THIRD. The said Court of Civil Appeals erred in deciding against the validity of an authority exercised under the United States drawn in question in the cause.

FOURTH. The said Court of Civil Appeals erred in deciding against the title, right, privilege and immunity specially set up and claimed by said plaintiff in error under the Constitution and Statutes of and authority exercised under the United States.

FIFTH. The said Court of Civil Appeals erred in deciding in favor of the validity of statutes of and authority exercised under the State of Texas drawn in question in the cause on the ground of their being repugnant to the Constitution and laws of the United States.

SIXTH. The said Court of Civil Appeals erred in giving validity to the statute of Texas approved August 13, 1870, drawn in question in this cause under a construction thereof which impaired the obligation of the contract entered into between the State of Texas and the predecessors of the railroad company, plaintiff in error, under and by virtue of the provisions of the Acts of the Legislature of the State of

Texas, approved February 9, 1861 ; December 16, 1863 ; May 28, 1864, and November 15, 1864.

SEVENTH. The said Court of Civil Appeals erred in giving effect to the statute of August 13, 1870, as impairing the obligation of the contract previously entered into between the predecessors of the plaintiff in error and the State of Texas under and by virtue of the acts approved February 9, 1861 ; December 16, 1863 ; May 28, 1864, and November 15, 1864.

EIGHTH. The said Court of Civil Appeals erred in sustaining the validity of the authority exercised under the State of Texas by the Governor and Comptroller thereof in canceling and discharging credits for payments made under and in accordance with the provisions of the Acts of the Legislature of the State of Texas, approved February 9, 1861; December 16, 1863 ; May 28, 1864, and November 15, 1864, drawn in question in the cause, on the ground of its being repugnant to the Constitution and laws of the United States.

NINTH. The said Court of Civil Appeals erred in affirming the validity of the action of the State through the Governor and Comptroller in canceling and discharging credits given for pay-

ment made by the predecessors of said plaintiff in error under and in accordance with the said Acts of February 9, 1861; December 16, 1863; May 28, 1864, and November 15, 1864, whereby said plaintiff in error and its predecessors were deprived of their property without due process of law, contrary to the Constitution of the United States.

TENTH. The said Court of Civil Appeals erred in deciding in favor of the validity of the action of the State of Texas, which, if held valid, deprived the railroad company, plaintiff in error in this cause, of property without due process of law.

ARGUMENT.

FIRST POINT.

The District Court erred in denying the application of the defendant to remove this cause into the Circuit Court of the United States, and the Court of Civil Appeals erred in affirming such action of the District Court.

It will hardly be disputed that this suit is one arising "under the Constitution or laws of the

United States," and the only questions presented in regard to the application made to the State Court for the removal of the case to the Federal Court are:

FIRST. Did it appear, at the time of such application by the plaintiff's statement of its own claim, that the suit was one arising under the Constitution, laws or treaties of the United States?

SECOND. If it did, was the application made in time?

I.

AT THE TIME THE APPLICATION WAS MADE TO REMOVE THIS SUIT TO THE FEDERAL COURT IT THEN APPEARED FOR THE FIRST TIME BY THE PLAINTIFF'S STATEMENT OF ITS OWN CLAIM THAT THE CASE WAS ONE ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

The situation in the present case is this: The State of Texas filed its petition against the Railway Company (Record, p. 1) alleging that on the 1st day of May, 1870, there was due to it from the Houston and Texas Central Railway Company the sum of $657,324.35, and from the

Washington County Railway Company $103,-840.01, on account of loans made to said railroad companies out of the "Special School Fund." It then averred in the petition that certain payments had been made on account of said loans, and that there was a balance due upon the loan to the Houston and Texas Central Railway Company of $411,935.84, with interest, and on the loan to the Washington County Railroad Company of $86,655.90, with interest, and demanded judgment for the amounts so claimed to be due (Record, p. 4).

It does not, of course, appear by the plaintiff's statement of its claim in its original petition that this suit arises under the Constitution and laws of the United States.

In its answer the railroad company averred that it had paid the school-fund loan to the railroad companies, to the rights of which it had succeeded, and the whole thereof, and that there was not due to the State of Texas on the 1st day of May, 1870, from the Houston and Texas Central Railway Company, the sum of $657,-324.35, as alleged in the petition, but the sum of $551,550, or from the Washington County Railroad Company the sum of $103,840.01, as in the

petition alleged, but the sum of $49,800. The defendant further averred that under the acts of the Legislature of Texas approved on the 16th of December, 1863, May 28, 1864, and November 15, 1864, the said railroad companies had paid to the State of Texas on account of said school-fund loans $152,864.55 in treasury warrants, and that credit therefor had been given to said companies on account of said loans; and the answer averred that the amounts claimed in the petition of the plaintiff to be due upon said school-fund loans on the 1st of May, 1870, were computed by discharging and canceling the credit theretofore given to said railroad companies for said payments in treasury warrants, and that, if such credit to which the defendant was entitled was given, it would be found that said school-fund loans had been paid in full (Record, pp. 5–23).

The State of Texas thereupon filed what is called its "First Supplemental Petition" (Record, p. 24 *et seq.*) and alleged:

(1) That the Acts of December 16, 1863, May 28, 1864, and November 15, 1864, were null and void in this:

> "That they specifically attempted to authorize the destruction and diversion of a

> special fund given to the State of Texas by the Federal Congress for special purposes and by previous act of the legislature set apart as the special school fund, and that said public schools of Texas had a vested right in said fund, and that the legislature had no subsequent authority to destroy said fund" (Record, p. 24).

(2) That the treasury warrants in which the railroad companies "did pay a portion of the debts" were null and void.

> "Because said warrants were bills of credit emitted by the State and therefore violative of Section 10, Article 1, of the Constitution of the United States" (Record, p. 25).

We take it that it needs no argument to show that it appears by the plaintiff's statement of its own claim in its first supplemental petition that the suit is one arising under the Constitution and laws of the United States. As appears from the summary of the contents of this first supplemental petition which we have just given, there was presented for consideration and decision (1) the construction of the Act of Congress approved September 9, 1850 (9 Stat. at Large, 446), giving to the State of Texas $10,000,000 in stock in settlement of the controversy in regard to the

northwestern boundary of the State, and (2) the question of whether certain payments by the railroad companies were void by reason of the provisions of the United States Constitution in regard to the emission of bills of credit by a State.

The essential conditions to the right to remove a case of this character are that the case must be one arising under the Constitution or laws of the United States, and that this must appear at the time the petition for removal is filed from plaintiff's statement of his own case. These conditions are fully met in the present case. The real, original and only controversy in this cause is over the validity of the payments made by the railroad company during the war in State treasury warrants. The real object of the State's suit is to have those payments set aside and the railroad company compelled to pay in legal currency the portion of its indebtedness claimed to have been discharged by such payments. The sole matter in dispute, which gave rise to and necessitated this suit, was the validity *vel non* of the payments in treasury warrants. The State's right to recover the balance sued for, and awarded in the judgment brought here for re-

view, has from the outset depended upon whether or not the Court would sustain or set aside the payments. It rested originally with the State whether the case should be one cognizable in the Federal Courts or not. If it limited its attack upon the payments to objections not of a Federal nature, the State Court would alone have jurisdiction; but, if it resorted to the Constitution or laws of the United States for weapons of attack, it opened the door for removal of the cause to the Federal Court. It was not within the power of the State, by an elliptical statement of its case in its original petition and a tardy presentation of its grounds of recovery in supplemental pleadings, to urge rights under the Federal Constitution and laws, and at the same time defeat the right of removal to the Federal Court. The State had to choose between a removable cause and a relinquishment of the advantage of urging against the validity of the payments objections founded on provisions in the Constitution of the United States or in any Act of Congress. When it based its right to recover, at least in part, upon the prohibition in the Federal Constitution against the emission of bills of credit and upon the Act of Congress granting to it the funds out of

which the loans in question were made, the case became one arising under the Constitution and Laws of the United States, and hence removable into the Circuit Court of the United States.

It may be contended, however, on behalf of the State, that, in determining whether a cause is removable or not, only the plaintiff's original petition or complaint will be looked at, and not his amended or supplemental pleadings by which he reveals the real nature of his suit and sets up the rights and grounds of recovery upon which he relies. It is said that, although the State elected, and manifested its election by its own pleadings filed in a preliminary stage of the case, to rely upon provisions in the Constitution and laws of the United States to make out its case and assist its recovery of the money sued for, yet its case must not be considered as one arising under the Federal Constitution or laws because the State chose not to disclose this part of its case in its original petition. In this connection an effort is made to introduce a distinction, novel in the law of the removal of causes, between original and defensive statements by a plaintiff of his case. It is said that the rights claimed under the Constitution and laws of the United States

are not a part of plaintiff's original case, but that the assertion of them was rendered necessary by the defendant pleading the payments in treasury warrants; that if the railroad company had not set up the payments the State would not have relied upon the Federal Constitution and laws to avoid them. It might be said with equal force and relevancy that, if there had been no controversy, there would have been no suit. The fact of the payments and the necessity of avoiding them before the State could recover the alleged balance sued for were well-known facts which antedated and gave rise to the suit. The issue in this suit—the validity *vel non* of the payments during the war in treasury warrants—was inevitable.

It has long been settled by this Court that under the Acts of Congress approved March 3, 1887 (24 Stat. at Large, 552), and August 13, 1888 (25 Stat. at Large, 433), a case cannot be removed from a State Court into the Circuit Court of the United States as one arising under the Constitution and laws of the United States, unless that fact appears by the plaintiff's statement of his own claim (Tennessee vs. Union and Planters' Bank, 152 U. S., 454; Chappell

vs. Waterworth, 155 U. S., 102; Postal Telegraph Cable Co. vs. Alabama, 155 U. S., 482; Walker vs. Collins, 167 U. S., 57), but it has never been decided by this Court that the statement of the claim so showing the ground of removal to the Federal Court must necessarily be found in the very first pleading filed by the plaintiff.

It is true that in the case of Tennessee vs. Union and Planter's Bank, 152 U. S., 454, and the cases subsequently decided by this Court in accordance therewith, the statement has often been reiterated that, if it does not appear from the plaintiff's statement of his own claim that the suit is one arising under the Constitution, laws and treaties of the United States, " the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings " (Chappell vs. Waterworth, 155 U. S., 102, 108). Careful examination of all these cases will, however, disclose that the " subsequent pleadings " referred to by the Court were the pleadings of the defendant, and, as we understand it, all that this Court meant or intended to mean by those words was that the defendant could not create a removable case by setting up a Federal question as a defense, but that such a case could only come to this

Court under the provisions of Section 709 of the United States Revised Statutes. In other words, the decisions of this Court hold that to remove a case to the Federal Court from a State Court upon the ground that it is one arising under the Constitution and laws of the United States it must so appear by the plaintiff's statement of his own case, and not by what the defendant may say. We, however, find no rule laid down by this Court that such statement by the plaintiff must be in his first declaration, petition or complaint, and not in a subsequent supplemental or amended pleading filed by him.

The case of Smith vs. Greenhow, 109 U. S., 669, is not without interest in the present discussion. It is true that it was a removal case arising under the Act of 1875 (18 Stat. at Large, 470), but it is important as showing that in order to warrant a removal of a case to the Federal Court as one arising under the Constitution of the United States it is not necessary that it should so appear from the first pleading filed by plaintiff. It is enough if it appears in a subsequent pleading, so long as that subsequent pleading is a pleading of the plaintiff, and it is clear that the plaintiff invokes the aid of the

Constitution and laws of the United States in order to sustain his case.

The facts were as follows: The declaration containing a count in trespass for entering plaintiff's premises and carrying away his goods was filed in the Circuit Court of the City of Richmond. The plea set up that the goods were lawfully taken by defendant as collector to satisfy a tax. The replication averred that plaintiff before the levy, under authority of a State statute, tendered in payment of the tax coupons cut from the bonds of the State. The rejoinders set up a subsequent law of the State forbidding defendant to receive anything in payment of taxes but gold, silver, etc. To this rejoinder the plaintiff demurred. This demurrer, being the fifth pleading, was the one from which it appeared that the plaintiff's case arose under the Constitution. The plaintiff removed the case to the United States Circuit Court for the Eastern District of Virginia and the defendant moved to remand. The motion was granted and upon appeal to this Court the order granting the motion was reversed. Mr. Justice MATTHEWS, speaking for the Court, said at page 670:

"The ground on which the order of the

> Court below, remanding the cause, was placed, seems to have been that no Federal question, such as is necessary to confer jurisdiction in the case upon the courts of the United States, appears to be necessarily involved in the issue raised by the pleadings. In this we think the Court erred. The replication alleges that the coupons tendered contained an express promise, as required by law, of the State of Virginia, that they should be received in payment of all taxes due to the State. The rejoinder is that the Act of January 26, 1882, subsequently passed, expressly forbids the defendant from receiving such coupons in payment of taxes. The demurrer in effect denies the validity of that law, and upon the record no ground of its invalidity can be inferred, except that it is avoided by the operation of that provision of the Constitution of the United States which forbids any State from passing laws which impair the obligation of contracts. *It therefore sufficiently appears upon the record, that the plaintiff's case arises under the Constitution of the United States.*"

In Cooke vs. Avery, 147 U. S., 375, the plaintiff brought a suit in trespass to try title in the Circuit Court of the United States for the Northern District of Texas. The basis of jurisdiction in that Court was diversity of citizenship One of the defendants filed a plea to the juris-

diction of the Court. Thereupon the plaintiff filed an *amended original* petition, claiming title to the property in question under an execution sale upon a judgment recovered in the United States Circuit Court for the Northern District of Texas, and alleged in his petition that by reason of certain laws of the United States and rules of said Federal Court such judgment was a lien upon the property from the date of its rendition. It was held by this Court that the case was one arising under the Constitution and laws of the United States, *although such fact did not appear by the original petition, but by the amended original petition.* The Court said, after much discussion of the facts, at page 390:

> "The disposition of this issue depended upon the laws of the United States and the rules of the Circuit Court, and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject matter was properly invoked."

Although the Cooke case was not a removal case, but one originally brought in the Federal Court, yet its value as an authority in the present discussion is quite as great, for this Court has held in Metcalf vs. Watertown, 128 U. S., 586, that:

"Where the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, *it must appear at the outset, in order to give the Court jurisdiction, that the suit is one of which the Court, at the time its jurisdiction is invoked, can properly take cognizance*" (Syllabus).

See, also, Colorado Central Consolidated Mining Co. vs. Turck, 150 U. S., 138.

In Third Street and Suburban Railway Company vs. Lewis, 173 U.S., 457, it is clearly brought out that there is no distinction between a case of original jurisdiction and a removal case in regard to the requirement that it must appear by the plaintiff's own statement of his claim and not by anything which the defendant may say that the case is one arising under the Constitution and laws of the United States. Mr. Chief-Justice FULLER, who delivered the opinion of the Court, said at page 460:

"It is thoroughly settled that under the Act of August 13, 1888, c. 866, 25 Stat., 434, the Circuit Court of the United States has no jurisdiction, either *original* or by removal from a State Court, of a suit as one

> arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. * * * If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied *by anything set up by way of defense.*"

In fact, the decision in the Tennessee Bank case (*supra*) (Removal Case) was largely founded upon the Metcalf case (*supra*) (Original Jurisdiction Case) and both where original jurisdiction in the Federal Court is invoked on the ground that the case arises under the Constitution and laws of the United States and where the right of removal from a State to a Federal Court is claimed upon the same ground, it is insisted by this Court that such ground must appear at the outset—*i. e.*, it must appear from the plaintiff's statement of his own case; and, as we have shown by the Cooke case (*supra*), it has been so held to appear at the outset—*i. e.*, in the plaintiff's statement of his own case, when it appears for the first time in the *amended original* petition; viz., the second pleading on behalf of plaintiff, as in the case at bar.

It will be observed that, in the Metcalf case (*supra*), the Court, after holding that it had no jurisdiction upon the ground that it did not appear by the complaint that the case was one arising under the Constitution and Laws of the United States, said, at page 590: "It will be for the Court below to determine whether the pleadings can be so amended as to present a case within its jurisdiction." These words would be idle and have no meaning unless they mean, as it was subsequently held in the Cooke case (*supra*), that it was permissible to consider, in determining jurisdiction, not only the original but all supplemental and amended pleadings of *plaintiff* in order to ascertain whether the case was one arising under the Constitution and laws of the United States.

If the plaintiff in the case at bar had been content to rely on the petition as originally filed by it, it is very clear that there could have been no recovery. It alleged that certain amounts were due from the railroad companies on the 1st of May, 1870. In order to prove this allegation it was necessary for the State of Texas to show that certain payments made to it by the railroad companies were void, and that said railroad com-

panies were not entitled to the credit therefor which appeared on the books in the office of the Comptroller of the State, and that such payments were void by reason of the Act of Congress of September 9, 1850 (9 Stat. at Large, p. 446), and because of the provision of the Constitution of the United States relating to the emitting of bills of credit by a State, as was alleged in the first supplemental petition filed by the State of Texas.

The first supplemental petition of plaintiff was not a reply to the answer of the defendant. In the first place no reply is required by the statutes of Texas, which provide that:

> "It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted" (Art. 1193, Rev. Stat. of Texas of 1895).

Further than that, suppose the defendant had simply filed a general denial instead of the full answer which it did interpose, would it not have been incumbent on the plaintiff to have amended its petition in order to allege a good cause of action? Would it not still have been obliged to

show that the payments made by the railroad companies under the Acts of 1863 and 1864 were void, and were void for the reasons stated in the first supplemental petition, and could it have done so unless such facts had been properly pleaded by it?

Nowhere is the rule to the effect that evidence offered must be supported by pleading averring the fact enforced more rigidly than in Texas.

Mims vs. Mitchell, 1 Texas, 443, 446.
Guess vs. Lubbock, 5 Texas, 535, 538.
McMullen vs. Guest, 6 Texas, 275, 283.
Roseborough vs. Gorman, 6 Texas, 313, 315.
Paul vs. Perez, 7 Texas, 338.
Thompson vs. Thompson, 12 Tex., 327–329.
Kelley vs. Kelley, 12 Texas, 452, 454.
Norvell vs. Oury, 13 Texas, 31.
Denison vs. League, 16 Texas, 399 408.
Texas B. & Ins. Co. vs. Stone, 49, Texas, 415, 16.
Grothaus vs. Witte, 72 Texas, 124, 126.

In *Mims vs. Mitchell*, *supra*, it appears that

the action was brought to recover the value and hire of a negro girl which, it was alleged, the defendant had failed to return to plaintiff, the owner, after the expiration of the time for which she had been hired. The defendant denied the allegations of the plaintiff, and alleged "that if plaintiff has suffered any loss he has accepted satisfaction for the same from the defendant, and that all hire has been punctually paid." In speaking of the insufficiency of the plea of accord and satisfaction, and the necessity of alleging every fact relied upon, the Court, which really established the system of Texas pleadings, said (1 Texas, 446, 447):

> "More especially is this true in reference to the pleadings under our system, where the technical *general issues* of the English system, adapted to their forms of action, each constituting the foundation for its own peculiar evidence and defense, are unknown. Under the *general issues*, as recognized in that system, matters of defense admissible in one form of action may be inadmissible in a different form of action. But, with us, neither the distinctions of the *forms* of action, nor the *general issues* exist; but our pleadings really are, or are intended to be, what the English pleadings are defined to be: *The statement in a*

legal and logical manner of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense, or the written statement of those facts, intended to be relied on as the support or defense of the party in evidence (3 Term R., 159). A general traverse or denial, in our system, is not to lay a foundation for the introduction of new affirmative matter in evidence, but simply to throw upon the plaintiff the burden of proof. Its office here is not to let in proof of independent facts, which shall constitute a defense, but to require the plaintiff to prove the truth of every averment material to his cause of action. But if the defendant is in the possession of facts which, admitting the averments in the petition to be true, show that the plaintiff still has no cause of action, as that (in the present instance) the slave had come to her death without any fault in him or his agents, and that, therefore, he is excused from restoring her to the owner and exonerated from any responsibility in consequence of his failure, these facts should be specially averred and pleaded; otherwise, the defendant ought not to be permitted to avail himself of them in proof."

All these cases go to show that whatever may be the right under the common-law system, or any other system of pleading, to introduce new

affirmative matter in evidence under the general traverse or denial, no such right has ever existed under the Texas system, but every fact relied on, either by the plaintiff or the defendant, must be pleaded. Under Article 1193 of the Revised Statutes of 1895, above quoted, it is not necessary for the plaintiff to deny the allegations of the defendant's answer, but under such implied denial of the defendant's answer the plaintiff cannot introduce anything not pleaded in his original petition, but must present the same by an amendment of his pleadings, and it is not material whether it is presented in the form of a substituted petition in lieu of his previous petition or by a supplemental petition. In either event it is a part of his case to be established by the evidence.

Prior to the filing of the State's first supplemental petition there was nothing in the pleading indicating any vice in the warrants used in making the payments in question. The evidence afforded by the State's own books was also free from taint; hence, if the State, standing upon its original petition, had offered evidence to show that the warrants used in making the payments were in form, or otherwise, illegal

as bills of credit emitted contrary to the Constitution of the United States, an objection would have lain thereto upon the ground that the fact thus sought to be established had not been pleaded. It was therefore essential to recovery by the State that the right it relied upon under the Federal Constitution to avoid these payments should be pleaded in order to admit proof of the same, and that pleading and proof of the right claimed under the Federal Constitution was as much a part of the State's case as the existence of the indebtedness in the first instance.

Since, then, the State's case—not only as it actually existed and as it was well understood by all parties from the beginning of the litigation to the present time, but also, as disclosed by its pleadings, as necessary to its recovery—was one depending for success upon a provision of the Federal Constitution, the right of the defendant, by timely action, to remove the cause to the Federal Court, would seem to be clear. Can this right, under the Federal Constitution and laws, be impaired or taken away merely by a form of procedure provided or sanctioned by State laws?

It is true, as observed by this Court in *Texas, and Pacific Railway Co. vs. Cody*, 166 U. S., 606

that a plaintiff may run his own risk in respect of the cause of action on which he proceeds, and he may, if he chooses, at his peril, omit a ground arising under the Federal Constitution or an act of Congress.

But if he is not willing to take such risk, and deems it safer to rely upon the Federal ground also, he does so subject to the right of his adversary to invoke the Federal jurisdiction.

Here the State did not see fit to rely upon the skeleton presented by its original petition; indeed, it could not have done so and have prevailed, as we have already shown. It deemed it necessary to invoke the Federal Constitution as a part of its case.

Now, we take it that it is not material, with respect to the right to remove, when or in what manner the plaintiff presents the Federal right, if it clearly appears that it is a part of his case and is one of the grounds relied upon for recovery.

Surely, the plaintiff cannot by presenting his case under the sanction of State practice, in different instruments, designated by arbitrary names and at different stages anterior to the trial, deprive the defendant of the right to re-

move to the Federal Court a case which appears from plaintiff's entire pleadings, regardless of their number, names or form, to be one arising under the Constitution or laws of the United States.

In other words, the question before the Court is whether a plaintiff can deprive a defendant of his constitutional right to a trial in a Federal Court of a case under the Constitution and laws of the United States by simply leaving out any reference thereto in his declaration, petition or complaint, and then, after the defendant has answered, filing another pleading showing his case to be of such a character, but insisting that, as it did not so appear in the original complaint, the defendant under the line of cases beginning with Tennessee vs. Union and Planters' Bank, 152 U. S., 454, could not remove the suit to the Federal Court.

In the case of Texas and Pacific Railway Co. vs. Cody, 166 U. S., 606, 609, it was said that "plaintiff * * * cannot cut off defendant's constitutional right, as a citizen of a different State than the plaintiff, to choose a Federal forum, by omitting to aver, or mistakenly or falsely, stating, the citizenship of the parties,"

and we respectfully submit that this Court never intended to be understood as holding in the Tennessee Bank case and Chappell vs. Waterworth (*supra*) that a plaintiff could cut off a defendant's constitutional right to choose a Federal forum for the trial of a case which was in fact one arising under the Constitution of the United States by omitting in his declaration or petition to aver all the facts constituting his cause of action and by supplying such omission in a subsequent pleading.

Just such a case as the present was in the mind of the Court in the case of Walker vs. Collins, 167 U. S., 57, when, speaking through Mr. Justice WHITE, it said, at page 59:

> "As in the complaint in the case at bar there are no facts averred showing that the controversy was one arising under the laws of the United States, *and it was not essential to the statement of the cause of action that such facts should be averred*, the case comes directly within the operation of the ruling cited."

It would seem that but one inference can be drawn from the words underscored in the quotation just given. That is to say, if an honest statement of the plaintiff's cause of action would

require that reference should be made therein to the Constitution and laws of the United States, if it is essential to the statement of the cause of action that such reference should be made, then, as we read these words of Mr. Justice WHITE, the plaintiff cannot leave such essential facts out of his complaint and then insert them in a subsequent pleading, and so defeat the defendant's constitutional right to try the case in a Federal forum.

Such was the line of argument in Oregon Short Line, &c., Railway vs. Skottowe, 162 U. S., 490, although the right to remove the case to the Federal Court was denied. The Court there said that the facts omitted from the complaint were not "necessary for the plaintiff to prove to maintain her action."

We therefore submit with confidence that it appears from the statement of its own claim within the meaning of the Tennessee Bank case (*supra*) and subsequent decisions of this Court that the case of the State of Texas is one arising under the Constitution and laws of the United States, and that the only question for the Court to determine is whether the application to remove the case to the United States Circuit Court for the Western District of Texas was made in time.

II.

THE APPLICATION TO THE STATE COURT TO REMOVE THE CASE TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF TEXAS WAS MADE IN TIME AND SHOULD HAVE BEEN GRANTED.

The case, as stated in the original petition of plaintiff, was not removable to the Federal Court, and the defendant, at the time or any time before it was required to answer or plead to said petition, could not have made application to the State Court for a removal of the case on the ground that it appeared, from the plaintiff's statement of its own claim, that the case was one arising under the Constitution and laws of the United States.

The question which now arises is whether the defendant's application to remove is made too late, if made as soon as it appears from the plaintiff's statement of its own case that it is a removable case. In other words, is the constitutional right of the defendant to try a case of this character in a Federal Court to be taken from him because he has not performed a mere matter of practice, which not only was not in his power

to perform, but was placed beyond his power to perform by the act of the plaintiff?

It is to be observed that the very day the plaintiff filed its first supplemental petition, for the first time pleading the facts upon which it relied to prove its case, and for the first time alleging the facts essential to make out its cause of action, the defendant presented its petition and bond for the removal of the cause to the United States Circuit Court for the Western District of Texas. The moment the case became removable, as one arising under the Constitution and laws of the United States, the application was made to bring it into the Federal Court.

It is of course true that the Act of August 13, 1888 (25 Stat L., 433), provides "that whenever any party entitled to remove any suit * * * may desire to remove such suit * * * he may make and file a petition * * * at the time, or any time before the defendant is required by the laws of the State * * * to answer or plead to the declaration or complaint."

The important words in this act to now consider are the words at the beginning of the section. They are "whenever any party entitled to remove any suit" desires to bring it into the Fed-

eral Court he must file his petition at the time, or any time before he is required to answer. The difficulty in the case at bar is that defendant "was not entitled to remove" the suit up to the time of filing its answer, and did not become entitled to do so until the first supplemental petition was filed, when the application was at once made. It would therefore seem that the requirement of filing the petition for removal by the defendant before the time to answer the declaration, petition or complaint must be construed with reference to the words "entitled to remove," and that the limitation of time for presenting the petition will only be enforced if during the period the defendant was also "entitled to remove." If during such period of limitation the defendant was not "entitled to remove," then the requirement that the application for removal must be made before the time to answer has expired does not apply to the case, and the defendant is permitted to remove a case, not removable at the outset, whenever it becomes removable, so long as the application is made as soon as the case could be brought to the Federal Court.

In the present case it would not be a very broad or strained construction of this statute to say that,

when the defendant was not "entitled to remove" a case until after the plaintiff had filed his amended declaration, petition or complaint, the law intended that defendant should have until he was required by law to answer such amended complaint within which to apply for a removal of the case to the Federal Court, for not until the time of filing the amended complaint did the essential condition of the imposition of the time limitation exist—to wit, that the defendant was "entitled to remove" the case.

Such was the view of the Removal Act taken by the United States Circuit Court for the Northern District of Texas in Evans vs. Dillingham, 43 Fed. Rep., 177. This case is important inasmuch as it is one arising under the Texas practice where the plaintiff does not seem to be required to state his cause of action in his original declaration or petition, but is permitted to wait until some subsequent pleading. In fact, in the case cited the cause of action was not stated by plaintiff until he had filed his *second* amended petition, and Judge McCormick very properly, as it would seem to us, held that the limitation of time for the presentation of a petition for the removal of a case to the Federal Court began to run from the time

of filing the amended petition which stated the plaintiff's cause of action. He said at page 180:

> " But the defendant also urges that plaintiffs' original and first amended petition presented no cause of action against the defendant, and that the second amended petition now constituting the petition of plaintiffs, he certainly could not be required to answer before the first day of the first term of the Court after it was pleaded, on which day his application for removal was made. It appears from an inspection of the pleadings that the original and first amended petition do not show any privity of the plaintiffs in the contract on which this suit is based. * * * There is no question in my mind that, where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading of the plaintiff. As an illustration of the propriety and necessity of so holding, take the case where a party sues in the State Courts, alleging the cause of controversy to be of less value, or not of greater value, than $2,000, and after the return term, and after the defendant has answered, the plaintiff files an amended petition, setting up the same cause of action, but claiming damages in a sum exceeding $2,000, can it be doubted that, if the state of the parties or the cause

> of action be such as to have given the right to remove had the amount in controversy been sufficient to give this Court jurisdiction, the defendant would not be denied his right to remove because the time within which he was required to answer the original petition had passed?"

In the case of Yarde vs. Baltimore and Ohio Rd. Co., 57 Fed. Rep., 913, 915, the same rule was again well stated as follows:

> "This right [of removal] cannot be defeated by any artifice, evasion or omission. If at any time during the progress of an action in a State Court, by amendment or otherwise, a cause of action not before removable is changed or converted into one which is properly removable, the defendant * * * has the right to file his petition and bond and secure a removal of the cause into the proper Federal Court."

The question of whether an application for the removal to a Federal Court of a case not theretofore removable is presented too late when made after the time of the defendant to answer the original declaration or complaint has expired, is, as we understand the reasoning of the Court in Powers vs. Chesapeake and Ohio Railway, 169 U. S., 92, no longer an open question. The facts in the Powers case are perhaps not identical

with the situation as it comes now before the Court, but the rule as there given permitting such removal after the time for answering the complaint has expired is for the reasons stated as applicable to the case at bar as to the Powers case. The only difference between the two cases is that the Powers case became a removable case *after the time of the defendant to answer had expired* by reason of diverse citizenship, resulting from the discontinuance of the case as to certain defendants, citizens of same State as plaintiff, while the present case became a removable case *after the time of the defendant to answer had expired*, by reason of the case then for the first time appearing to be a case arising under the Constitution and laws of the United States because of the statement of plaintiff's own claim in its supplemental petition.

In the Powers case it appeared that the plaintiff brought an action to recover damages for personal injuries in the State Court of Kentucky against the Chesapeake and Ohio Railway Company, and the conductor, engineer and fireman of the railway train which injured him. Before the time of the defendant railway company to answer the complaint had expired, it removed

the case to the Circuit Court of the United States for the District of Kentucky. A motion to remand the case was made by plaintiff, and was granted upon the ground that there was no separable controversy between plaintiff and the railway company, and that, as the other defendants were citizens of the same State as the plaintiff, no removable case was presented by the record.

A year after the first petition for removal was presented, and when the case was called for trial, the plaintiff discontinued his action against the individual defendants, leaving the case one between a citizen of Kentucky on the one side and a foreign corporation on the other, and clearly removable into the Federal Court. The railway company then filed a second petition for removal, which the State Court denied. The railway company excepted to the denial, and the case proceeded to trial, resulting in a verdict and judgment for plaintiff, from which judgment the defendant company appealed to the Court of Appeals of the State.

The railway company filed a transcript of the record of the proceedings in the State Court in the Circuit Court of the United States for the District of Kentucky at the next term of that

Court, and the plaintiff moved to remand upon the ground, among other things, that the petition for removal was not filed in time. The motion was denied, it being held by the Court that the application to remove was, under the circumstances of the case, made in time.

The case was afterwards called for trial in the Circuit Court of the United States, and the plaintiff declined to proceed to trial upon the ground that the Court was without jurisdiction because the case had been improperly removed thereto. The Court thereupon dismissed the action and rendered final judgment for defendant. The plaintiff then sued out a writ of error from this Court upon the sole ground that the cause was not properly removed into the Federal Court and that therefore the Court was without jurisdiction. The judgment of the lower Court was affirmed by this Court in an opinion delivered by Mr. Justice GRAY, in which he said, at page 98:

> " Undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defense whatever in its courts. * * *

" But it by no means follows, when the case does not become in its nature a removable one until after the time mentioned in the act has expired, that it cannot be removed at all. * * *

" The question whether a defendant may file, in the State court in which the suit was commenced, a petition for removal, after the time mentioned in the Act of Congress has elapsed, in a case which was not removable when that time expired, is now directly presented for adjudication ; and the answer to this question depends upon the terms and effect of the act in force when these proceedings took place.

" In order to warrant a removal from a court of a State into a Circuit Court of the United States, according to the terms of that act, the necessary diverse citizenship or other foundation of the jurisdiction of the Circuit Court of the United States must exist. It is only when that does exist that 'any party entitled to remove any suit' 'may make and file a petition in such suit in such State Court at the time, or at any time before the defendant is required by the laws of the State, or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court, to be held in the district where such suit is pending,' and to give bond to file a copy of the record in that court, 'on the first

day of its then next session' (Act of March 3, 1887, c. 373, as corrected by Act of August 13, 1888, c. 866, 25 Stat., 435).

"This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the Act of Congress, that 'any party entitled to remove any suit' 'may make and file a petition for removal' at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same State as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2,000, and was afterwards discovered to be so much graver, that there could be no doubt of the power and the duty

of the Court to allow an amendment increasing the *ad damnum*.

"The reasonable construction of the Act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.

"The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time.

* * * * *

"It was thus made to appear, upon the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable by reason of the diverse citizenship of the parties. Such being the case, it was rightly removed by the second petition for removal

into the Circuit Court of the United States; and this petition was rightly permitted to be amended in that court."

It would, therefore, seem clear, under the decision in the Powers case, that the application to remove this case to the United States Circuit Court for the Western District of Texas was made in time, although made after the time of the defendant to answer the original petition of the plaintiff had expired.

SECOND POINT.

This Court will determine for itself whether there was a valid contract between the State and the Houston and Texas Central Railway Company and the Washington County Railroad Company, by virtue of the Acts of the Texas Legislature, approved February 9, 1861; December 15, 1863; May 28, 1864, and November 15, 1864, independently of the judgment of the State Court respecting the existence and validity of such contract.

The Acts of 1861, 1863 and 1864 were in effect an offer on the part of the State of Texas to receive treasury warrants in payment of the school-fund loan, if treasury warrants were first re-

ceived by the railroad companies "at par with specie for freight and passenger travel."

The time for paying the interest and sinking fund having been extended by the Act of January 11, 1862 (Appendix, p. 19), until January 1, 1864, no payments were made in warrants prior to that time. In order, therefore, to use warrants in making the payment in question, it was necessary, under the Acts of 1864, that the Railroad Company should receive warrants at par with specie in the payment of freight and passenger fares. The warrants were at a large discount. Railroad companies, however, received them at par with specie, as required by the acts referred to. The acts required the Comptroller to ascertain whether they had done so before accepting warrants in the payments of the loans, and made him the exclusive judge of the fact. It is not open to dispute that they did receive them, for the Comptroller so found, as evidenced by his acceptance of the warrants and his allowance of credit therefor at the time upon the books of the State (Record, p. 115 *et seq.*), and of course the regularity of his action in the premises and the performance by him of the duty enjoined upon him by the acts of the Legislature will be pre-

sumed. Indeed, this has never been disputed, but it has been assumed throughout by all parties that the Comptroller properly performed his duties and satisfied himself that the Railroad Companies had accepted warrants at par with specie in the payment of freight and passenger fares, as required by the Acts of 1864, and had complied with all the conditions of those acts as to the right to use the warrants in making the payments.

It will, of course, not be doubted that the passage of the Acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, and the acceptance by the railroad companies of the offer thereby made, constituted a contract between the State and the railroad companies; and that, in the subsequent course of dealings between them, every time a payment was made to the State by the railroad companies in treasury warrants, such contract to the extent of such payment became completed and fully executed.

From the beginning of this litigation we have maintained that the obligation of the contracts arising in the manner indicated was impaired by the Act of August 13, 1870 (Record, p. 13);

but before taking up the discussion of this branch of the case it will, we think, be useful to understand clearly what the views of the Court below were upon the question of the contract between the State and the railroad companies.

Decision of the State Court.

The State Court, after disposing of the removal question to its satisfaction, goes on to say that "the only controversy between the parties" is "whether the payments made by the railway companies in State Treasury warrants are valid and binding upon the State" (Record, p. 213). It then decides that the Treasury warrants, in which the Special School Fund loans must have been paid (although it is not proved), were intended to circulate as money, and that they were, therefore, void under Sec. 8, Art. 7, of the State Constitution of 1845, and that the State was, therefore, not bound to allow the railroad companies credit for such payments made in obligations void under the State Constitution, and the Court in effect determined that there was therefore no contract between the State and the railroad companies to be impaired by any subsequent Act of the Legislature (Record, pp. 213 and 214).

This Court Can Take Jurisdiction.

It is claimed by the defendant in error that by reason of this decision by the State Court the judgment of which is now sought to be reviewed, there is no Federal question determined which would entitle this Court to take jurisdiction of the case under Section 709 of the United States Revised Statutes. The argument is that the State Court simply held that there was no contract between the State and the railroad companies and decided no question as to any subsequent legislation which is alleged by the plaintiff in error to impair the obligation of the contract. The Court below decided that there was no contract, and, as the other side maintain, such decision will be respected by this Court and in no way re-examined, even if this Court should not agree therewith, inasmuch as the non-existence of the contract is in no way concerned with the Federal question of whether the obligation of such contract, supposing it to have existed, had been impaired by a subsequent Act of the Legislature and is a matter for the State Court alone to determine.

It is, however, well settled by the decisions of this Court that when a case is brought here by writ of error to the highest court of a State upon the ground that the obligation of a contract made by the plaintiff in error has been impaired by a subsequent Act of the Legislature of the State, this Court will examine and determine for itself whether there is in fact a contract, and is not in any way bound by the decision of the State Court in that regard. If this were not so it would, as was said in McCullough vs. Virginia, 172 U. S., 102, 117, "always place it in the power of a State Court to determine our [this Court's] jurisdiction."

In the case of University vs. People, 99 U. S., 309, it appeared that a statute of the State of Illinois, passed in 1855, declared that all the property of the Northwestern University should be forever free from taxation. Subsequently and in 1872 an act was passed which the university claimed impaired the obligation of the contract arising under the Act of 1855, inasmuch as the assessors and the Supreme Court of the State had by their construction of the acts limited this exemption from taxation to land and other property *in immediate use by the institution.* The

Supreme Court of the State (being the highest court of the State) held that there was no valid contract between the university and the State of Illinois arising from the Act of 1855, inasmuch as such act was void by reason of its being in conflict with the State Constitution of 1848, and placed its decision entirely upon this ground. In the brief in this court of the Attorney-General as printed at page 317 of the report of the case it was said: "In this case it neither appears from the record, nor otherwise, that the decision of the State Court was based upon, or in any manner affected by, any law of the State passed subsequently to the making of the supposed contract." When the case came on for argument the Attorney-General moved to dismiss for want of jurisdiction, upon the ground that the State Court had simply held that there was no contract, and, therefore, nothing to be impaired by any subsequent law. The motion was denied, and the decision of the State Court was reversed. Mr. Justice MILLER delivered the opinion of the Court, and said at page 319:

> "This question of jurisdiction to review the judgments of State courts is so frequent, and the principles which govern it so well

settled, that we need not be very elaborate in our opinion on that point. The argument is that the judgment of the State Court is limited to a construction of the fourth clause of the amendatory charter of 1855, as it is affected by the Constitution under which it was enacted, and that whether that statute was a contract or not, or whether it was properly construed or not, it is still but the decision of a Court construing a contract or a statute, and there is no law of the State impairing the obligation of that contract within the meaning of the Constitution of the United States. * * *

"It is strenuously insisted that these provisions of the Constitution of 1870 and the revenue law of 1872 do not repeal the exemption as established by the fourth section of the amended charter of 1855, because that section was in excess of the authority conferred by the Constitution of 1848. But this depends on the construction of that contract as affected by the Constitution under which it was enacted. If by virtue of that Constitution the Legislature of that day could only exempt plaintiff's real estate so far as it was in immediate use for school purposes, as was held by the Supreme Court, then it may not repeal that statute or impair that contract, for the exemption will probably amount to the same thing under either statute. But if it is a contract, as is contended for by plaintiff's counsel,

which, under a true construction of the Constitution of 1848, exempts all the property of plaintiff which is held by it for appropriation to the purposes of the university as a school, as an institution for teaching, and which is held for no other purpose whatever, and which can as effectually promote the purpose by leases, of which the rent goes to support the school, as in any other way, then the law of 1872 and the Constitution of 1870 do, to the extent of the difference arising from these two constructions, impair the obligation of the contract of 1855.

"Whether that contract is such as to be impaired by these later laws is one of the questions of which this Court always has jurisdiction. * * *

"Though the Court is here construing the Constitution of its own State, and is therefore entitled to our consideration on that ground, as well as for its character and standing for learning and ability, we find ourselves, in the performance of the duty of reviewing this case, compelled to differ with that Court in the nature and extent of the constitutional limitation of this contract, as made by the Legislature of the same State. For this Constitution necessarily becomes a part of the contract which is said to be impaired by subsequent legislation."

It is unnecessary to suggest to the Court the

unusual similarity of the Illinois case to the case at bar. In both, the highest Court of the State decided that there was no contract such as was claimed by the plaintiff in error in this Court by reason of certain prior provisions of the State Constitution, and in both cases the State Courts put their decision upon that ground without deciding any question as to the effect of any subsequent legislation. As the motion to dismiss for want of jurisdiction was denied in the Illinois case, it would seem that upon the authority of that decision the motion to dismiss in the present case should also be denied.

In the case of the Bridge Proprietors vs. Hoboken Co., 1 Wall., 116, the doctrine is most concisely stated in the syllabus as follows:

> "Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the State *construes* the *first* statute in such a manner as that the second statute does not impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is 'drawn in question,' and the decision is 'in favor' of its validity, within the meaning of the 25th section of the Judiciary Act of 1789."

In the case of Fisk vs. Jefferson Police Jury, 116 U. S., 131, the facts were as follows: Fisk, who was an attorney at law, brought three suits to recover the salary and fees due him from the Parish of Jefferson as District Attorney. He obtained judgments in each case against the police jury, which is the governing body of the parish. Not being able to obtain the payment of these judgments, he made application for writs of mandamus to compel the assessment and collection of a tax for the payment thereof. The writs of mandamus were denied by the Supreme Court of Louisiana, and the cases were brought to this Court upon the ground that the judgments dismissing the writs were founded upon the law of Louisiana which impaired the obligation of the contract of Fisk as District Attorney for the Parish of Jefferson.

It appeared that the services for which Fisk recovered judgments were rendered in the years 1871 to 1874 inclusive, and during this period there was in force an Act of the Legislature of 1871 under which Fisk was entitled to an assessment and collection of a tax for the payment of these judgments. Thereafter and before the application for the writs of mandamus was made

the Constitution of the State of 1880 declared that no parish tax for all purposes should exceed ten mills on the dollar of valuation. The police jury showed that they levied the full amount of taxes permissible under this clause of the Constitution, and the State Court held that they could not be compelled to levy more. It was decided that the employment of Fisk as District Attorney for the parish did not constitute a contract. This question was the only one discussed in the opinion, and on that ground the decision was rendered. The judgments of the State Courts were reversed by this Court, the effect of the decision being that the State Court could not defeat the jurisdiction of this Court simply by saying that there was no contract. The Court said, at pages 133 and 134:

> "In answer to the argument that, as applied to plaintiff's case, the constitutional provision impaired the obligation of his contract, *the Supreme Court decided that his employment as attorney for the parish did not constitute a contract, either in reference to his regular salary or to his compensation by fees. And this question is the only one discussed in the opinion, and on that ground the decision rested.* * * *
>
> "But, after the services have been ren-

> dered under a law, resolution or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note."

In Louisville and Nashville R. R. Co. vs. Palmes, 109 U. S., 244, 256, it was said:

> " The question we have to consider and decide is whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. *In reaching a conclusion on that point, we decide for ourselves, indepen-*

dently of the decision of the State Court, whether there is a contract, and whether its obligation is impaired; and, if the decision of the question as to the existence of the alleged contract requires a construction of State constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well-settled doctrine of this Court."

In State Bank of Ohio vs. Knoop, 16 How., 369, 391, it was said:

"The rule observed by this Court, to follow the construction of the statute of the State by its Supreme Court, is strongly urged. This is done when we are required to administer the laws of the State. The established construction of a statute of the State is received as a part of the statute. But we are called in the case before us, not to carry into effect a law of the State, but to test the validity of such a law by the Constitution of the Union. *We are exercising an appellate jurisdiction. The decision of the Supreme Court of the State is before us for revision, and, if their construction of the contract in question impairs its obligation, we are required to reverse their judgment.* To follow the construction of a State Court in such a case would be to surrender one of the

most important provisions in the Federal Constitution."

Perhaps the case most often quoted upon this subject is The Jefferson Branch Bank vs. Skelly, 1 Black, 436, where it was said, at page 443 :

> " We answer to this, as this Court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been that the construction given by the courts of the States to State legislation and to State constitutions have been conclusive upon this Court, *with a. single exception*, and that is when it has been called upon to interpret the contracts of States, ' though they have been made in the forms of law ' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a Court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself

aggrieved by some particular State legislation if this Court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this Court should or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case it makes no difference in the obligation of this Court, in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State by its authority."

One of the last expressions of this principle by the Court is to be found in the case of McCullough vs. Virginia, 172 U. S., 102. This is one of the many cases arising under the coupon legislation of Virginia. It was decided by the State Court that the coupon provision of the Act of

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1871 was void, and it was claimed that this Conrt had no jurisdiction of the case for the reason that the State Court did not consider in its opinion the subsequent legislation of the State alleged to have been passed with a view of impairing the obligation arising under the Act of 1871, but limited itself entirely to the consideration of that act which it adjudged to be void. The jurisdiction of this Court was sustained, and the judgment of the State Court was reversed. As appears by the syllabus of the case it was expressly decided :

> (2) " That this Court has the right to inquire and judge for itself with regard to the making of the alleged contract with the holder of the coupons without regard to the views or decisions of the State Court in relation thereto." * * *
>
> (4) " That, while it is true that the State Court placed its decision on the ground that the Act of 1871 was void in so far as it related to the coupon contract, the judgment also gave the effect to subsequent statutes; and this Court has jurisdiction of the case."

In Water Power Co. vs. Street Railway Co., 172 U. S., 475, 487, Mr. Justice BROWN, who delivered the opinion of the Court, said that :

> " This Court has so frequently decided, notably in the very recent case of McCullough vs. Virginia, 172 U. S., 102, that it is the duty of this Court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question."

To the same effect see:

Delmas vs. Insurance Company, 14 Wall., 661, 668.
Wright vs. Nagle, 101 U. S., 791, 793.
N. O. Waterworks vs. La. Sugar Co., 125 U. S., 18, 38.
Mobile & Ohio Railroad vs. Tennessee, 153 U. S., 486, 492.
Shelby County vs. Union, &c., Bank, 161 U. S., 149, 151.
Chicago, etc., Rd. vs. Nebraska, 170 U. S., 57, 68.

It would, therefore, seem clear that this Court is not precluded from taking jurisdiction of the present case, because the State Court placed its decision upon the ground that there was no contract between the State of Texas and the railroad companies under the Acts of the Legislature of 1861, 1863 and 1864, by reason of the unconstitutionality of the treasury warrants in which the payment by the railroad companies

was made, inasmuch as by such construction of the contract the Act of August 13, 1870, remains valid under the Constitution of the United States, and the validity of such action was drawn in question, and the decision of the State Court was in favor of its validity within the meaning of Section 709 of the United States Revised Statutes (Bridge Proprietors vs. Hoboken Co., *supra*).

THIRD POINT.

The contract between the State of Texas and the railroad companies as it appears upon the record was valid. The State failed to sustain by proof its attack upon the same, and the grounds upon which the Court of Civil Appeals held the same invalid are untenable.

I.

THE TRUE CONTRACT BETWEEN THE STATE OF TEXAS AND THE RAILROAD COMPANIES AS IT APPEARS UPON THE RECORD.

In accordance with the doctrine to which we have heretofore referred, it is necessary to now examine the case *de novo* and ascertain whether in the judgment of this Court there was, in fact,

a valid contract between the State of Texas and the railroad companies.

The facts as to the existence of the contract are few and uncontroverted. It is undisputed that the Acts of 1861, 1863 and 1864 were passed by a duly-constituted Legislature, and that in themselves they are free from any charge of invalidity and unconstitutionality.

These acts simply constitute an offer upon the part of the State of Texas to allow the railroads to set off at par whatever State treasury warrants they may hold against their indebtedness to the State on account of the school-fund loans, provided the railroad companies will receive State treasury warrants at par for freight or passage at the prices or rates established by law.

The offer made by the State was accepted by the Washington County Railroad Company and the Houston and Texas Central Railway Company, and all the requirements contained in said acts to be performed by the railroad companies were performed by them. Copies of the acts in question were posted in the cars of their lines of road and in their railroad stations, and the State treasury warrants were received by the railroad

companies at par for freight and passage upon their lines.

Upon an accumulation from time to time of the State warrants received by them, the railroad companies paid and delivered them to the Comptroller of the State of Texas on account of the interest due upon the school fund loans, and credit was given to said railroad companies upon the books of the State for the amount of such payments.

This closed the transaction arising upon the offer of the State contained in the Acts of 1861, 1863 and 1864, and resulted in a completed and executed contract, the obligation of which on the part of each of the parties thereto was not to deprive the other of the rights and interests which had vested thereunder.

II.

THE ACTS OF 1861, 1863 AND 1864, WHICH CONTAINED THE OFFER WHICH WAS ACCEPTED BY THE RAILROAD COMPANIES ARE OF INDISPUTABLE VALIDITY.

While its opinion upon the point is not at all clear, yet we do not understand that the Court of Civil Appeals meant to include the Acts of Feb-

ruary 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, in its somewhat wholesale attack upon the legislation of the war period (Record, p. 214). There is certainly nothing in the terms of the acts themselves inconsistent with the Constitution, and this being so, and the acts being complete in themselves, the Courts have, we submit, no right to speculate about almost forgotten facts for grounds upon which to annul the legislation.

When legislative acts are challenged as unconstitutional, they are always upheld unless manifestly in violation of the Constitution, and the Supreme Court of Texas has often applied this rule (*Gunter vs. Texas Land and Mortgage Company, 82 Tex., 496, 503; Barker vs. Torrey, 69 Tex., 7, 12; Wright vs. Adams, 45 Tex., 134; Orr vs. Rhine, 45 Tex., 345, 354; Sutherland vs. De Leon, 1 Tex., 250, 304*). In approaching the consideration of these acts, therefore, they must be regarded as valid, and every reasonable presumption must be indulged in their favor. This is especially true, as against an attack, upon the ground that they were enacted from improper and unlawful motives prompting the Legislature, and to accomplish an

illegal design. They should be read in the light of the Constitution and judged accordingly, without regard to controverted facts, obscured by lapse of time. We submit that *where a statute is clearly within the constitutional power of the Legislature, and is free upon its face from any apparent vice, the Courts cannot seek in the motives and objects of the Legislature for grounds upon which to annul it.* Acts which are within the constitutional power of the Legislature, and are not by their terms contrary to the paramount authority of the National Government, are, it seems to us, necessarily beyond the reach of the Courts, and any inquiry into the motives and objects of the Legislature, not apparent upon the face of the acts, for ground on which to annul them, is unwarranted. We submit, therefore, that Courts cannot properly look beyond the acts in question and test their validity by inquiring into the motives and objects that may have prompted the Legislature to pass them.

The attention of the people was distracted by the war then raging, and, while the chief incidents of the struggle are remembered and have taken their place in history, the objects and purposes of legislation enacted in those

days, further than as disclosed by the legislation itself, are at this late day unknown, and can be divined only by the merest speculation. It may be true that these acts were made necessary by the war, but the difference between acts passed to *promote* the rebellion and those *on account* of the rebellion—between those whose object was to *assist in carrying on the war* and those *occasioned* by the war—is too obvious to require demonstration. The State had engaged in a desperate struggle. Its resources were well nigh exhausted by the war. Its treasury was empty, and the sources of revenue were exhausted. Specie was unknown, and treasury warrants drawn by the Comptroller to meet appropriations made by the Legislature for the support of the State Government, as well as for other purposes, could not be collected. The State was without the means wherewith to pay the salaries of its officers and of the agents necessary in conducting the government, or for protecting society, guarding the safety of its inhabitants, and performing the only functions for which government exists. By the acts in question some opportunity was afforded to the holders of the obligations of the State, having occasion to use the railroads, to

get par for their warrants, which in turn the State could take up by canceling to the same extent indebtedness due it. Thus the State was able to utilize its assets in satisfying its own obligations incurred in conducting the government. Who can say that this did not enable the State to keep up the civil government and preserve social order? Who can say that these acts were not deemed by the Legislature absolutely essential to that very purpose? Certainly there is nothing upon the face of the acts inconsistent with such object; but, on the contrary, they were well calculated to accomplish it. Must not the Courts attribute to the Legislature this lawful and worthy object in enacting these laws, instead of an illegal purpose?

There is certainly nothing in these acts to indicate that they contemplated the use of any but legal warrants, or any except warrants issued in the ordinary way to pay appropriations duly made for the support of the government.

The collection of the debt due by the railroads in specie had been rendered impossible by the action of the State in engaging in the war which drove all lawful money out. Being unable therefore to collect the indebtedness due it, and use

the money thus collected as it might have done in paying the warrants drawn in favor of its own creditors, the State, by these acts, in effect, drew upon its debtors in favor of its creditors, which was obviously the only available means at the time of utilizing its assets in paying its liabilities. This not only did not contemplate a "circulation" of the warrants, but was a means for taking up and canceling them, thus preventing the circulation which was otherwise inevitable, since the State was without cash or other means of paying them. Instead of *aiding* the circulation of the warrants, as held by the Court of Civil Appeals, these acts were designed to *restrict* and were among the few means of *restricting and preventing* their circulation.

So our contention is that these laws which authorized the payments in question constitute an independent piece of legislation, complete in itself, which must stand or fall on its own merits; that they are not so connected with other laws relating to the State's finances as to be affected necessarily by any violation of the Constitution of which those other laws may be guilty. Judged by their own provisions, and considering the immediate subject matter, the acts violate no

by themselves. It is not at all impossible, or even difficult, to believe that the Legislature did pass, or would have passed, those laws without any reference to the alleged unconstitutional legislation. Indeed, there is evidence of this in the Act of February 9, 1861. We submit that the validity of the laws in question must be sustained, whatever view may be taken of the general financial policy and laws of the State of Texas during the war.

Certainly the Act of February 9, 1861, is not subject to the objection urged against the others, and we can conceive of no ground on which it can be avoided, as the war had not begun at that time.

While that act only authorized the sinking fund to be paid in treasury warrants, yet it is evidence of the policy of the State at that early day, with which the subsequent acts were in harmony. It shows the disposition of the State to accept treasury warrants in payment of the indebtedness in question, and this too at a time when there is no room for the charge that such policy was adopted to aid the circulation of warrants. We beg to emphasize the importance of this act, not only as authority for the payments,

provision of the State Constitution, and are such laws as the Legislature was then perfectly competent to pass. An unconstitutional provision in a law does not invalidate even other provisions of the same statute, unless the valid and invalid provisions are so connected and interdependent that they cannot be separated, and, hence, it must be presumed that the Legislature would not have enacted the valid provisions if the invalid portions were stricken out. *A fortiori*, is it true that an unconstitutional law cannot invalidate another law, passed at a different time, unless the two laws are clearly, directly and necessarily connected and interdependent, so that one cannot stand without the other. It is not sufficient that a connection is possible or probable or may be inferred. Now, can it be truly said, in any proper sense of the words, that there is a direct, certain, necessary connection and interdependence between these acts and the laws, the sins of which the State seeks to visit upon them? On the contrary, the alleged connection, if any, is indirect and uncertain—and a by no means necessary inference from the history of the times. The acts are complete in themselves, stand by themselves, and must be judged

but also as an aid to the construction of the others, and as evidence, practically conclusive, that the later acts authorizing the payments in warrants were but in pursuance of a lawful policy of the State.

III.

THE EXISTENCE OF THE CONTRACT BETWEEN THE STATE AND THE RAILROAD COMPANIES, BEING LAWFUL UPON ITS FACE AND BEING CLEARLY ESTABLISHED, IT DEVOLVED UPON THE STATE TO PROVE THE FACTS RELIED UPON TO SHOW ITS ILLEGALITY.

As we have seen, the original petition of the State shows that it does not declare simply upon the bonds of the railroad company, nor upon the legislative contract embodied in the Act of 1856, authorizing the investment of the Special School Fund in railroad bonds. It declares upon the bond contract and the legislative contract of 1856, *but as modified by* the Act of August 13, 1870. The petition sets out the provisions of the Act of 1870, and avers that they were accepted by defendant. The act provides that the railroad company might avoid the sale of its railroad for indebtedness to the State for loans from the Special School Fund, and for the

non-payment of principal and interest, by the payment into the treasury of the State, on November 1, 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on May 1, 1870, and by the payment, in addition, on November 1, of one per cent. upon said aggregate amount, to be applied toward the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest, and one per cent. on account of said sinking fund semi-annually thereafter.

The meaning of this provision is manifest. The state of war and the period of reconstruction which followed it having interfered with the regularity of payments on account of the Special School Fund loans, the State deemed it necessary to make a fresh start and to arrange for regularity of payments in the future and for the gradual extinction of the debt. To this end, a new starting point had to be provided, and the State determined to take the status of the account of each railroad company as it stood on May 1, 1870, as the new starting point and basis for future payments. Hence, arose a modification

of the original contract, evidenced by the bonds and Act of 1856. In virtue of such modification the railroad companies agreed to discharge the loans evidenced by the bonds, and the State agreed to allow such loans to be discharged, by the payment of the aggregate amount of indebtedness as the matter stood on May 1, 1870, payments to be made semi-annually, at the rate of six per cent. per annum interest, and one per cent. semi-annually as a contribution to the sinking fund.

It is clear from the petition of the State that it has brought this suit in affirmance, not in disaffirmance, of this modification of the original contract. It, therefore, became necessary for it both to allege and to prove what were the aggregate amounts of the indebtedness as the accounts stood on May 1, 1870. The object of the suit being to recover, not the amount of the bonds, but the balance left of the aggregate indebtedness as the account stood on May 1, 1870, after crediting defendant with the payments admitted in the petition to have been made since that date, the all-important fact is what was the status of the accounts on May 1, 1870. Assuming the burden of pleading, as

needs she must, the State alleged that the aggregate indebtedness, as the matter stood on May 1, 1870, was $657,324.35 in the case of H. & T. C. Ry. Co., and $103,840.01 in the case of the Washington County Railroad Co.

In its answer defendant takes issue with the State as to the amount of the indebtedness at the new starting point fixed by the legislation of 1870. It is denied that the amount due by the old H. & T. C. Ry. Co. was $657,324.35, and it is averred that it was $551,550; and in the case of the Washington County Railroad Company it is denied that the amount was $103,840.01, and it is averred that it was $49,800. The averments of the answer which precede and follow the issues made as to the status of the indebtedness on May 1, 1870, explain and show the controlling importance of that issue. They give a history of the creation and administration of the Special School Fund by the Legislature so far as it bears upon the present case, including a statement of the payments made before, during and since the war. They show that the debts have been completely extinguished by the payments which the State, in her petition, admits to have been made since

1870, unless the State is able to establish that the amounts due, as the accounts stood on May 1, 1870, were as alleged in her petition. There is nothing in the answer to relieve the State of the burden of proving the status of the accounts as they stood on May 1, 1870; without such proof the balance, if any, due by the defendant cannot be determined.

It follows from the foregoing that the ultimate fact to be determined in this case was what was the aggregate amount of the indebtedness of each company as matters stood on May 1, 1870. All the questions and issues lead up to this fact. There is no dispute as to the amounts paid since May 1, 1870. We may go further, and say that there is no dispute, or rather no room for dispute, as to the aggregate amount of the indebtedness as the accounts stood on the books of the State May 1, 1870. The only evidence in the record of such indebtedness, as it stood on May 1, 1870, were certified transcripts from the books of the Comptroller's department, and those transcripts showed that the aggregate amount of the indebtedness, "as said aggregate amount stood on the "1st day of May, 1870," of the H. & T. C. R. Co. and of the Washington County Railroad Co., was

$551,550 and $49,800 respectively, instead of $657,324.35 and $103,840.01, as alleged by the State. The sole matter thus left in dispute was the correctness of the accounts. The State charged that certain credit entries on the accounts were illegal and null, and that the defendants should be recharged with the amounts thus credited.

The object of the foregoing discussion is to show that this is not an ordinary suit to recover a loan, evidenced by notes or bonds, where it suffices for plaintiff to introduce in evidence the notes or bonds, and where it devolves upon the defendant to prove any payment pleaded.

But to meet every possible view let us consider the petition as a declaration upon the bonds executed for the money loaned, as well as upon the basis fixed by the act referred to. We find, in either aspect of the matter, that defendant, in answer to the State's petition, pleaded (Record, p. 23), in detail, various payments upon said indebtedness sufficient in the aggregate to extinguish the same, as is conceded on all sides, provided all such payments were valid. Among the payments thus pleaded were those made in State treasury warrants. As authority

for making the payments in warrants, the answer set forth the acts of February 9, 1861, of December 16, 1863, and May 28 and November 15, 1864, whereby the railroad companies were authorized to tender, and the Comptroller was required to receive, treasury warrants in payment of such indebtedness. That these pleas were good will not, we apprehend, be seriously questioned. To avoid them, the State, by supplemental petition, set up the alleged illegality in the warrants, and in the acts authorizing their payment.

Thus, the issue was joined—the plaintiff alleging an indebtedness, and the defendant pleading payments chiefly in money, and the balance in treasury warrants, and referring to laws authorizing the payments in warrants, and the plaintiff, in reply, seeking to avoid the payments in warrants by alleging facts to show that they were illegal and unauthorized.

Under the issues thus made, it undoubtedly devolved upon the plaintiff to prove the indebtedness alleged. She proved the amount of the *original loan*, and the execution of the bonds described in the petition by the admission of the defendant.

The defendant, to sustain its plea of payment,

introduced transcripts from the books of the Comptroller's Office (Record, pp. 115–134), duly authenticated and certified to by the Comptroller under his seal of office, as provided by statute, showing all payments made on said indebtedness down to May 1, 1870, and the standing of the account on that date; and also introduced the certificate of the Comptroller, showing the payments made subsequent to May 1, 1870 (Record, pp. 132–134). This evidence fully sustained defendant's pleas of payment, and showed the satisfaction of the indebtedness described in plaintiff's petition. It showed that the payments in warrants were made to and accepted by the Comptroller as pleaded in the answer. It did not show the date or denomination of the warrants, or the purposes for which they were issued, but it did show that they were received by the Comptroller apparently without question, and that he gave credit upon the books of the State therefor as authorized and required by the acts of the Legislature above referred to. It appearing, therefore, that the payments were made in warrants of a character which the Comptroller—the officer charged by law with that duty—received, and for which he gave credit upon the

books of the State, it would seem to follow inevitably that the defendant had discharged fully its burden of proof. It then devolved upon the State to show, if it could, that the warrants were not of a character which the Comptroller was authorized to receive. The acts authorizing the payments did not specify any particular series or kind of warrants. But suppose it were otherwise—suppose the statute had authorized the payment to be made in warrants of a certain date, and of a certain denomination, and of a certain series, and required the Comptroller to receive them in payment, and the proof should show that payments were made in warrants without indicating their character, but which the Comptroller received and allowed as payments, and credited upon his books—could it possibly be held in such a case that such proof did not show, at least *prima facie*, valid payments, and satisfy the burden of proof resting upon the defendant? Upon what principle could it be contended that the defendant should do more than show that the payments were made in warrants, which the Comptroller accepted and allowed as valid payment? Would it not be presumed, upon familiar principles, that the officer accepted

only the warrants which he was authorized by law to accept? Such presumption is peculiarly applicable here, because there is not only the presumption that the officer of the State performed his duty, and received only warrants which he was authorized by law to receive, but there is the further presumption that the officer would not receive, and the railroad companies would not pay, illegal warrants; or, in other words, it is presumed that they did not engage in a transaction positively illegal.

It is argued that, because there was supposed to be in existence, at the time these payments were made, treasury warrants issued for illegal purposes, it devolved upon the defendant, not only to prove the payments, but to go further and prove that no illegal warrants were included, or, in other words, that the defendant should not only prove its own case, but should, by evidence, negative the existence of a fact which, if admissible at all, could be so only in behalf of the plaintiff for the purpose of avoiding the case made by the defendant. It could be contended, we submit, with just as much reason, that it devolved upon the defendant to show that the money used in making the payments shown to have been made in money was not counterfeit.

It is familiar law that, when a statute has confided to any public officer the power and duty to determine questions of fact arising in the course of his duties, the findings made by him are conclusive. The only question which can arise between an individual, claiming rights based on the decision or acts of the public officer, and the public or any person denying the validity thereof, are fraud and collusion, or absolute want of power in the officer to act in the premises. As the Acts of 1861, 1863 and 1864 authorize payments in treasury warrants, and impose upon the Comptroller the power and duty to ascertain compliance with the conditions imposed by law, and to receive only regular, valid warrants of the State, it follows that, on proof of the delivery, by the defendants, of treasury warrants under the legislation of 1861, 1863 and 1864, and the acceptance thereof by the Comptroller, a presumption arises as to the existence of all the facts necessary to the validity of the transaction, which can be rebutted only by the State's proving either that there were no valid treasury warrants in existence at the time, or that the particular warrants used were invalid.

But the State contends that the presumptions

which usually exist in favor of the regularity and validity of official acts do not exist in the present case, because the State and all or a large majority of its inhabitants were in sympathy with the war and actively engaged in promoting it, and, hence, it is not to be presumed that the Comptroller or Treasurer entertained different opinions, or would act counter to the known sentiments of the State and the people, whose public servants they were. This position is utterly inconsistent with that assumed by the State when it attempts to meet the defense that it could not get relief from the consequences of its own wrongful act. Then it denied for itself and the people of Texas any part or responsibility for the acts of its officers; now, it claims that these same officers, in respect to the same acts, were so directly and completely controlled by the mandates and sentiments of the people of the State that there cannot be attributed to them the independent judgment and discretion which such public officers are generally presumed to exercise. But, giving to this contention of the State its greatest effect, we simply reach the point that there is no reason for supposing that the Comptroller would have refused warrants

issued to circulate as money, if any such had been tendered, and we are as far off as ever from any positive proof as to the character of the particular warrants actually used.

This contention and the judgment of the Court below in effect fully sustaining it is directly opposed to the law as long since settled and recently reaffirmed by judgments of this court (*Thorington vs. Smith*, *8 Wall.*, *1*, *12*; *Horne vs. Lockhart*, *17 Wall.*, *570*, *580*; *Sprott vs. United States*, *20 Wall.*, *459*, *464*; *Williams vs. Bruffy*, *96 U. S.*, *176*, *192*; *Johnson vs. West India Transit Co.*, *156 U. S.. 618*, *645*; *Baldy vs. Hunter*, *171 U. S.*, *388*).

In *Johnson vs. West India Co.* (156 U. S., 645) this Court said:

> "This contention is disposed of by referring to the well-settled doctrine, affirmed in repeated decisions of this court, that "the acts of the several States, in their individual capacities and of their different departments of government—executive, judicial and legislative—during the war, so far as they did not impair, or tend to impair, the supremacy of the National authority or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and

> war did not loosen the bonds of society or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects when they were not hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of the citizens under the Constitution."

It would seem to follow that one attacking an act done during the war has the burden of showing that it did "impair, or tend to impair, the supremacy of the National authority or the just rights of citizens under the Constitution." Furthermore, he must not only prove that such was the *effect*, but, under the decisions of this Court, he must go further and prove that such was the "*actual intent*." In *Thorington vs. Smith* this Court, in speaking of transactions in Confederate notes, said (8 Wall., 1, 12):

> "They are transactions in the ordinary course of civil society, and though they

> may indirectly and remotely promote the ends of the unlawful government are without blame except when *proved* to have been entered into with *actual intent* to further invasion or insurrection."

The necessity of proof of the "actual intent" to further invasion or insurrection was recently emphasized by this Court in Baldy vs. Hunter, 171 U. S., 388, 395.

In ordinary cases this Court has often recognized the rule that he who holds the affirmative must prove it. As the Court said, in United States vs. Linn, 1 How., 104, 111, "the general rule is that he who holds the affirmative must prove it;" and, unless the rule is to be disregarded in this case, it would seem that the burden of proving the kind and character of the warrants in question fell upon the State, which affirmatively alleged that they were invalid for certain reasons. Whether they were invalid for the reasons alleged could only be proved by showing what was their nature and description.

In United States vs. Howland, 4 Wheat., 108, it appeared that the United States claimed priority over other creditors of an insolvent in the case of an assignment which did not purport to con-

vey all the debtor's property. By the Act of 1799 the United States was not entitled to such priority unless the debtor had made an assignment of all his property. It was held that the burden of proof was upon the United States to show that the assignment was in fact an assignment of all the debtor's property. At page 116 it was said by Chief-Justice MARSHALL that :

> " The deed then conveys only the property contained in the schedule, and the schedule does not purport to contain all the property of the parties who made it. In such a case the presumption must be that there is property not contained in the deed unless the contrary appears. The *onus probandi* is thrown on the United States. * * * The depositions do not aid the deed. The question whether the whole property is assigned is still left to conjecture; and this being the fact on which the preference of the United States is founded ought to be proved. Not being proved, the Court is of opinion that this is not a case in which it can be claimed."

In Moore vs. Greene, 19 How., 69, 72, it was said :

> " The burden of proof falls upon him who attempts to disturb a possession of ages, transmitted and enjoyed under the forms of law."

In Clements vs. Macheboeuf, 92 U. S., 418, it was held that where a party alleges that a deed executed by his attorney, under a power to convey, is invalid for matters not apparent on its face, the burden of proving them is on such party, and the Court said at page 425 :

> " Charges of bad faith are easily made ; but they are of no avail to the party making the same, unless he introduces competent evidence to support the accusation."

In Prevost vs. Gratz, 6 Wheat., 481, it was held by Mr. Justice STORY that,

> " to establish the existence of a trust, the *onus probandi* lies on the party who alleges it."

The rule, therefore, applicable to this case, would seem to be that the burden of proving that the treasury warrants in question were null and void for the reasons stated fell upon the State of Texas which so alleged, and that the railroads were not required to show that the warrants were valid. Especially is this so in view of the fact that the presumption is that acts of a State done by its officers are constitutional and valid, and the presumption in the

present case is that the warrants were issued under a constitutional law, and that the act of the Comptroller and Treasurer of the State of Texas in receiving such warrants and giving the railroads credit therefor was perfectly proper and legitimate and in accord with the Constitution and laws of Texas.

IV.

THE STATE FAILED TO PROVE AND THE RECORD CONTAINS NO EVIDENCE SHOWING THE CHARACTER, DATE OR DENOMINATION OF THE WARRANTS SURRENDERED TO THE STATE BY THE RAILROAD COMPANIES IN MAKING THE PAYMENTS IN QUESTION.

The evidence wholly fails to show when or for what purpose the warrants used in making the payments in question were issued, or the character of the warrants in any respect—whether they were issued before or during the war, and, if during the war, whether for civil or military services, and there is nothing to indicate in any way their form or denomination. The transcript from the books of the Comptroller's Office, introduced in evidence, showed the payments as pleaded, and that they were in treasury warrants acceptable to, and which were, in fact,

accepted by, the Comptroller, who was the officer designated by law to receive them, and that credit for such payments was duly given at the time upon the books of the State.

The District Judge, himself, found that it had not been proved whether the warrants actually used in making the payments were warrants issued for State indebtedness incurred after the war began, or, if the latter class, whether they were warrants issued for military purposes or for civil indebtedness, etc. (Third Finding of Fact, Record, p. 71).

There is absolutely no conflict in the evidence upon this or any other point in the case. While the statement of facts occupies a large part of the record, it consists chiefly of documents, etc. That there were abundant warrants issued to pay appropriations for the support of the State government and for other lawful purposes available for use in making these payments is a fact admitting of no dispute.

Large appropriations were made just before the commencement of the war, and during the war, for the ordinary expenses of the civil government of the State, which the State was without means to pay. The Legislature which convened

on November 7, 1859, and adjourned February 13, 1860, appropriated for the support of the State Government during the years 1860 and 1861, and for other lawful purposes, $1,169,082.08 (Gen. Laws First Reg. Ses. 8th Leg., pp. 1, 9, 11, 18, 20, 21, 30, 35, 36, 37, 38, 59, 79, 86, 102, 112 and 119). The extra session of the Eighth Legislature, which convened January 21, 1861, and adjourned April 9, 1861, appropriated for lawful purposes, including the defense of the frontier for the year 1860, and to meet deficiencies in former appropriations, $311,594.50 (Gen. Laws, Extra Ses. 8th Leg., pp. 1, 8, 17, 32, 44 and 53). The first regular session of the Ninth Legislature, which convened November 4, 1861, and adjourned January 14, 1862, made appropriations for the support of the civil government and for other lawful purposes, aggregating $693,252.90 (Gen. Laws, First Reg. Session 9th Leg., pp. 3, 7, 31, 44, 47, 55, 56). The first extra session of the Ninth Legislature, which convened February 2, 1863, and adjourned March 6, 1863, made appropriations for lawful purposes aggregating $293,295.60 (Gen. Laws, Ex. Ses. 9th Leg., pp. 7, 11, 28 and 31). It is an historical fact that the treasury of the State

was practically empty at the beginning of the war, and that the revenues of the State were totally inadequate to meet the ordinary expenses of the civil government of the State during the war, and, indeed, were practically suspended for that period. Governor Houston convened the Legislature in special session on January 21, 1861, because of the condition of the State's finances, and to provide for the large indebtedness of the State, especially that incurred for defense of the frontier against Indians.

It is to be observed that the Court of Civil Appeals does not find that the warrants were drawn otherwise than to pay appropriations made by the Legislature for lawful purposes, and, indeed, there is no evidence whatever showing that they were drawn for any other purpose than the payment of appropriations duly made by the Legislature for lawful purposes.

It seems hardly possible that the questions which were so seriously discussed in the opinion of the Court below, and the reasons there advanced to show the unconstitutionality and general invalidity of these warrants, were all considered and given without any knowledge of or proof as to the character of the warrants about which

the Court was speaking. It is almost inconceivable that a Court should deliberately and solemnly declare that a treasury warrant was invalid for certain specified reasons without ever having seen such warrant, and without any proof that such warrant fell within the conditions from which the Court reached its conclusions. Such, however, is the case here, for the record is absolutely barren of proof as to the character or date of a single treasury warrant paid to the State of Texas by the railroads under the Acts of 1861, 1863 and 1864.

The State's witness, McCall, testified at page 179 of the record as follows:

> "The plaintiff next introduced W. C. McCall as a witness, who, after being duly sworn, testified in effect that he was employed in the Comptroller's department and had been so employed about eighteen months, and that he had been, at the instance of the Attorney-General, assigned by the Comptroller, together with G. A. Proctor, to the duty of searching for evidence of the character of the warrants in which the payments in question were made; that he had been unable to find any data or memoranda of any kind showing the kind or character of warrants used in making such payments; that there was a large number

of old warrants, purporting to have been issued during the war, in the basement of the Comptroller's Office, without any endorsement or writing on them to indicate, and he was unable to find any data or memoranda to indicate by whom or for what purpose or on what account such warrants were received or from whom they were received; that he had not examined all the warrants in the basement, but, at the request of the Attorney-General, representing the plaintiff in this case, had taken from the lot a number, which he then produced and identified as those taken by him from the basement of the Comptroller's Office shortly before the trial."

Another witness for the State, G. A. Proctor, testified as follows at page 182 of the record:

"The said witness further testified that he, with W. C. McCall, had been, at the instance of the Attorney-General, assigned by the Comptroller to the duty of searching for evidence of the character of the warrants in which the payments in question were made; that he had been unable to find any data and memoranda of any kind showing the kind or character of warrants in making such payments; that there were a large number of old warrants purporting to have been issued during the war in the basement of the Comptroller's Office without any endorsements or writing on them to indicate by

whom or for what purpose or on what account such warrants were received, or from whom they were received."

R. S. Lovett, the attorney for the plaintiffs in error, took the stand as a witness for defendant, and his testimony at page 185 of the record is as follows:

"The witness testified that he had been specially charged by his associates with the preparation of this case for trial; that he had called upon the Treasurer and Comptroller of the State of Texas for information respecting the character, date and denomination of warrants used in making the payments in controversy, and asked for copies of any records of their respective departments giving such information, but that he was informed by said Comptroller and Treasurer that they were without such information, and that it was not disclosed by any records of their departments; that he made diligent effort to find some official or employee of defendant or person having knowledge of the kind and character of warrants used in making such payments, but that he had been able to find no such person, and no such person who was connected with defendant at the time such payments were made."

The railroad also examined its auditor, George Kidd, who said at page 185 of the record:

"That he was auditor of the Houston and Texas Central Railroad Company, the defendant, and as such had charge of its books and papers, and was familiar with them; that he had made diligent search of the books and the records of defendant company to ascertain whether there was anything therein to show the date, character or denomination of the warrants used in making the payments in question, and that he had found nothing whatever in reference thereto.

"On cross-examination he testified that the books showed the fact, dates and amount of payments in warrants, but not the kind, character or denomination of the warrants."

The defendant also offered in evidence the deposition of E. W. Cave, who was examined as a witness by the State, but the State only offered in evidence a small part of his testimony. Cave testified as follows at pages 178 and 187 of the record:

"As I have said in my answer to previous interrogatories, I am without knowledge of the kind or character of warrants used by the Houston and Texas Central Railway Company in making the payments referred to" (Rec., p. 178).

"I have no knowledge as to the kinds of warrants used by the Houston and Texas Central Railway Company in making the

payments in question. I had no connection with that company at that time, or with the treasury department of the State of Texas" (Rec., p. 187).

The foregoing is substantially the entire evidence in the record upon the question, and the sum and substance of it all is that there is no evidence whatever in this case as to the kind and character of the warrants paid by the railroads on account of the school-fund loans to them.

Not only does no witness pretend to say that any of the warrants, which have been injected into this case against the objection of defendant, were a part of the warrants surrendered to the State by the railroads, but nobody even undertakes to say that the warrants put in evidence and printed in this record were of the same kind, character and description as the warrants surrendered to the State by the railroads under the Acts of 1861, 1863 and 1864.

The admission in evidence of the warrants produced by the witnesses for plaintiff was, of course, strenuously opposed by the defendant, but all objections were overruled (Rec., p. 92), and the warrants were introduced in evidence. Remembering that no one testified that the

warrants so let into the case were of the same kind, character, denomination and description and of the same date as the warrants surrendered in pursuance of the Acts of 1861, 1863 and 1864, let us see what the Court below proceeded to hold:

It was seriously stated by the Court of Civil Appeals that the warrants must have been issued in violation of the State Constitution for the purpose of circulating as money, because during the war acts of the Legislature were enacted which enabled warrants of small denominations to be issued, but whether the denomination of the warrants actually surrendered in this case was large or small is unknown, and it is also unknown and a mere matter of speculation as to whether the warrants in question were issued before or during the time of the war.

We have, therefore, the rather novel and curious situation of a Court having declared certain treasury warrants to be absolutely void for certain specified reasons, without knowing at all whether the facts in regard to such warrants brought them within the reasons from which its conclusions were drawn.

If, as we think we have shown, it is within the

province of this Court to inquire whether or not there was a contract between the railroads and the State of Texas, arising under the Laws of 1861, 1863 and 1864, of course such inquiry is confined to the record in this case. This record shows a *prima facie* case of a contract arising from the offer of the State contained in said acts and a compliance with the terms thereof by the railroads, but is entirely devoid of any evidence tending to show the nature of the warrants in question, the date of their issue, or any other fact from which it would be possible to determine whether such warrants were null and void on the ground of unconstitutionality or for any other cause. It would seem, therefore, that when this Court comes to examine this record for the purpose of determining whether there was a contract between the State of Texas and the railroads it will be confined to the evidence therein contained, which consists simply of the offer contained in the Acts of 1861, 1863 and 1864, the acceptance thereof, and the performance thereunder by the railroads and the acceptance by the State of such performance as a complete performance under the offer. This would seem to make out a *prima facie* case of contract, and there

is absolutely no evidence in the record showing or tending to show that the whole transaction was void by reason of the character of the warrants surrendered to the State, inasmuch as there is no evidence anywhere in the case to show what the character of such warrants was. For all that appears by the record the warrants surrendered by the railroads to the State of Texas were all issued prior to the war and were of a large denomination, and there is nothing to show but that each one of the warrants so surrendered to the State was issued in payment of the civil expenses of the State.

In the absence of any proof in this record as to the date, denomination or character of the treasury warrants, it is not plain how this Court, on an examination of the question of the existence of the contract in this case, can say that there was no contract and that the whole transaction between the State and the railroads was void and to be set aside because of the character of such treasury warrants, as was done by the Court below.

In Keith vs. Clark, 97 U. S., 454, it appeared that plaintiff tendered to the defendant, who was a collector of taxes, $40 in bills of the

Bank of Tennessee. The offer of the plaintiff was based upon a section of the charter of the bank enacted in 1838 that the bills of the said bank should be receivable by all tax collectors in all payments for taxes due the State. The defendant declined to receive the $40 of bills of the Bank of Tennessee, and the plaintiff paid the amount in lawful money under protest and brought suit to recover the same.

Upon the trial it was proved that the bills were issued subsequently to May 6, 1861, and were worth about 25 cents on the dollar. The Court charged the jury that if the notes tendered were issued subsequently to May 6, 1861, and during the existence of the State Government established at that date in hostility to the Government of the United States, the defendant was not bound to receive them. The theory of the trial Court apparently was that the contract arising from the charter of the bank was within the protection of the Constitution except as to notes issued during the time of the war, and as to those notes the amendment to the State Constitution of 1865 which declared that all the notes of the bank issued after May 6, 1861, were null and void, was not unconstitutional as

impairing the obligation of the contract for the reason that such notes were issued in aid of the Rebellion.

The jury found a verdict for the defendant and the Supreme Court of the State affirmed the judgment rendered upon such verdict. The case was brought to this Court by writ of error, which took jurisdiction and determined first whether there was a contract and then whether it had been impaired. The judgment of the Court below was reversed, and, upon the question whether the notes had been issued in aid of the Rebellion and were therefore void, it was held that there was no evidence whatever in the record and the Court declined to pass upon the point. Mr. Justice MILLER, who delivered the opinion of the Court, said, at page 466, as follows:

> "We cannot infer, then, that these notes were issued in violation of any Federal authority.
>
> "On the other hand, if the fact be so, nothing can be easier than to plead it and prove it. Whenever such a plea is presented, we can, if it comes to us, pass intelligently on its validity. If issue is taken, the facts can be embodied in a bill of

exceptions or some other form, and we can say whether those facts render the contract void. *To undertake to assume the facts which are necessary to their invalidity on this record is to give to conjecture the place of proof and to rest a judgment of the utmost importance on the existence of facts not found in the record nor proved by any evidence of which this Court can take judicial notice.* We shall, when the matter is presented properly to us, be free to determine, on all the considerations applicable to the case, whether the notes that may be then in controversy are protected by the provision of the Constitution or not. And that is the only question of which, in a case like the present, we would have jurisdiction."

It is unnecessary to point out the somewhat extraordinary similarity between the Keith case and the case at bar. Both were brought to this Court upon the ground that a contract had been impaired by a subsequent law of the State.

In the former the question was whether the contract was void because certain bills were issued in aid of the Rebellion. The Court declined to pass upon it because the record was without evidence upon the question. In the case at bar the question presented is whether the contract is void because the treasury warrants were

in violation of the Constitution. As to this the record is absolutely without evidence, and applying the principle declared in the Keith case we submit that this Court in a case of this importance will not substitute conjecture for proof and will not rest its judgment upon facts not found in the record.

V.

IT IS NOT SHOWN BY THE RECORD NOR BY THE LEGISLATION REFERRED TO BY THE COURT OF CIVIL APPEALS, THAT THE WARRANTS SURRENDERED TO THE STATE BY THE RAILROAD COMPANIES IN MAKING THE PAYMENTS IN QUESTION WERE ISSUED TO CIRCULATE AS MONEY, OR WERE BILLS OF CREDIT EMITTED BY THE STATE.

There being nothing whatever in the evidence to show the date, denomination, character or form of the warrants used in making the payments in question, the Court of Civil Appeals resorted to the legislation of the war period for evidence of the facts which the State had wholly failed to prove, and finds a general indefinite governmental policy, supposed to be revealed by various acts passed during that period, involving the violation of the State Constitution, which prohibits the issuance of treasury warrants to circulate as money.

This governmental policy, the existence of which is evidenced solely by acts of the Legislature authorizing the issuance of treasury warrants, optionally in small denominations, to actual creditors of the State, and pursuant to specific appropriations, and making them receivable for taxes and other debts due the State, is supposed to have a blighting effect on all transactions or contracts involving the use of treasury warrants, and on all future laws on independent matters during the war, the operation of which would effect a payment or discharge of any indebtedness represented by treasury warrants.

We submit that this Court will not sanction this novel mode of invalidating laws and contracts.

The facts disclosed by the laws cited and by the history of the times are simply that the finances of the State of Texas during the war, like those of every other Southern State, were in a state of great disorder. Her treasury was empty. There was no specie or United States currency in circulation. It was impossible to carry on the government on a cash basis. The State had to run the government on a credit basis or abdicate her functions and let

anarchy reign, and all civil order and protection to life and property cease, and society go to destruction. Should she have chosen the latter alternative? She did not do so, but conducted the government on credit, issuing treasury warrants to represent the expenses incurred. There was nothing novel or illegal in this. The treasury warrants of a State have always been assignable, and are almost invariably assigned, if any interval elapses between their issuance and payment. They are generally receivable in payment of taxes and debts due the State. Why should not a State pay debts due by her with debts due to her? The mere fact that some of her treasury warrants might have been issued in small denominations does not constitute them, and certainly not all others, bills of credit. A treasury warrant issued to a creditor of the State, pursuant to a specific appropriation to pay it, as evidence of an indebtedness actually due to the person to whom issued, never can be a bill of credit or paper prohibited by the State or National Constitutions as unlawful currency, whatever be its form or denomination. *The fact that it was issued on account of a debt and with reference to a specific appropriation is utterly*

inconsistent with its being issued to circulate as money.

It is not found, and no one has yet suggested, that any warrants were issued except upon appropriations duly made by the Legislature. Now, we submit *that warrants drawn by the Comptroller upon the Treasurer, in conformity with the practice prescribed by law since the creation of the State Government, for the purpose only of paying appropriations duly made by the Legislature, and in accordance with the only method prescribed by law for disbursing the funds of the State, cannot, in the nature of things, be deemed bills of credit, or considered as issued with the intention that they should circulate as money.*

We find that in the very legislation providing for the organization of the State Government it was provided, and has ever since been the law, that no money shall be paid out of the treasury, except on the warrants of the Comptroller (Rev. Stat., 1895, Art. 2855). We find, furthermore, that as early as March, 1846, it was made the duty, and has ever since been the duty, of the Comptroller, to "draw warrants on the Treasurer for the payment of all moneys directed by law to be paid out of the treasury" (Rev. Stat. 1895, Art. 2831).

The provision of the State Constitution on which the State relies (Sec. 7, Art. XVI.) was in force when these statutes were passed—indeed, had been adopted less than a year before—and has remained unchanged to this time. These statutes were practically contemporaneous with the Constitution, and have been followed every day since; and it has never been suggested before that they were contrary to the Constitution, and that the Comptroller, in the performance of his plain statutory duty during all these years, was exercising power prohibited by the Constitution. This is sufficient evidence that such warrants were not regarded in any sense as within the constitutional prohibition. As said before, there is no contention that any warrants were ever issued, except in obedience to appropriations made by the Legislature, and in the exercise of the powers conferred and the performance of the duties imposed by the statutes above referred to. What possible difference, then, can it make what the denomination or form of the warrants may have been? It is not denied that they contain all the requisites prescribed by statute. It had not been supposed before that the legality of the warrants depended

upon the color of the paper selected by the Comptroller, the size or form of the sheets, or the extent or character of the engraving appearing upon them. They were issued, as all must concede, to pay appropriations duly made, and in the performance of the duty imposed on the Comptroller. The argument, however, is, in effect, that the obligation of the State depends upon its ability to pay, and that the State's creditor commits an unlawful act in accepting an order on the Treasurer for the money admittedly due him. In other words, the substance of the contention is that a warrant, lawful when the State is able to pay, and which is the only means permitted by law for collecting money of the State, becomes unlawful as soon as the State becomes unable to pay it!

In drawing these warrants the Comptroller was acting under the same statute that he acts under to-day. The language of the warrants—the words used—were the same then as now. The only difference is that the State is now able to pay the warrants. Then it was unable to do so. This condition was not the fault of the creditors, or the Judges of the Courts, or other officers and agents of the State to whom

they were issued. It was due to the act of the State in plunging into the war, and driving all money from circulation, thereby depriving itself of the money with which to pay the warrants, and compelling its creditors to use them as best they could. It is not an unheard-of thing, even in these times, for treasury warrants to become the subject of barter and sale, and to be exchanged by the employees of the State for articles of merchandise, and be used in the payment of their debts. Fortunately such conditions are rare, but they are not unknown, and are liable to recur at any time. The holders of them were no more guilty during the war than the holders of them are to-day. Then, as now, they were circulated, if at all, only through necessity—a necessity brought about by the State itself. *If the State had paid the warrants, they would not, of course, have been circulated. They were passed from hand to hand only because the State was without money with which to pay them, and would have disappeared on almost the very day that the State should secure money with which to meet them.* Can it be held that the inability of the State to pay its just debts outlawed its obligation? In its final analysis this is precisely what

the decision of the Court of Civil Appeals means.

If the warrants in question are not in violation of the State Constitution it would seem to follow that they are equally unaffected by the provision of the Constitution of the United States which declares that no State "shall emit bills of credit" (Art. I., Sec. 10), for, as we understand it, it is necessary that an obligation of a State should have been issued for the purpose of circulating as money before it can be said to be embraced within the provision of the Federal Constitution referred to. In other words, the State Constitution prohibited in express words the issuing of warrants to circulate as money, while by the decisions of this Court the clause of the Federal Constitution has been construed to mean that no State "shall emit bills of credit" to circulate as money.

In Briscoe vs. Bank of the Commonwealth of Kentucky, 11 Pet., 257, 318, the following definition of a bill of credit was given:

> "To constitute a bill of credit within the Constitution it must be issued by a State on the faith of the State, and *be designed to circulate as money*. It must be a paper which circulates on the credit of the State, and is so

received and used in the ordinary business of life."

In Poindexter vs. Greenhow, 114 U. S., 270, the facts so far as material to the present controversy were as follows : The plaintiff owed the State of Virginia twelve dollars and forty-five cents for taxes upon property owned by him in the City of Richmond. The defendant, as the Treasurer of the City of Richmond and Collector of Taxes, demanded of the plaintiff payment of the taxes due by him to the State. The plaintiff, upon such demand, tendered to the defendant in payment thereof coupons issued by the State of Virginia under the provisions of the Act of the General Assembly of that State of March 30, 1871, entitled " An Act to provide for the funding and payment of the public debt." The defendant refused to receive the said coupons so tendered by plaintiff, and, as he deemed that he was required to do under the Statutes of Virginia, entered the plaintiff's place of business and took possession of his desk for the purpose of selling the same to pay the taxes due from him.

The plaintiff, therefore, brought an action in *detinue* against the defendant for the recovery of the desk before a Police Justice in the City of

Richmond, who dismissed the action for want of jurisdiction. An appeal was taken to the Hustings Court for the City of Richmond, which Court was of the opinion that the Police Justice erred in dismissing the case for want of jurisdiction, and that the issues in the action might have been tried by him and that it should be tried by the Court on appeal. The Hustings Court thereupon held that the coupons tendered by the plaintiff in payment of his taxes were not what the law required and that the defendant as tax collector was not required to receive them.

The Hustings Court being the highest Court of the State to which the cause could be taken, a writ of error to that Court was sued out bringing the case before this Court; and, among other objections to the coupons and their acceptance by the defendant when tendered in payment of the plaintiff's taxes, it was urged that they were in violation of the Federal Constitution, which declared that no State should "emit bills of credit" (Art. I., Sec. 10). The great ground of this contention was that the coupons were substantially money and that they were passed from hand to hand, and, as appeared upon their face, were receivable for all taxes, debts and demands

due the State, and that, therefore, these coupons were in effect "bills of credit," and prohibited by the Constitution.

In the opinion of the Court, delivered by Mr. Justice MATTHEWS, these coupons were spoken of as "money" and as being "legal tender." At page 279 it was said: "They [the coupons] were by that act reduced, in effect, into money, and, as between the State and its taxpayers, were a legal tender as money." Again, upon the same page, the Court said: "After a tender of such coupons by a taxpayer in payment of taxes, and a refusal by a tax collector to receive them, the situation and rights of the taxpayer and coupon holder were precisely what they would have been if he had made a like tender in gold coin and it had been refused." The same idea was reiterated on page 281, as follows: "As we have seen, the coupon holder, whose tender of genuine coupons in payment of taxes has been refused, stands upon the same footing in this respect as though he had tendered gold coin in similar circumstances and with like result."

Notwithstanding the view of the Court that these coupons were in effect money for certain purposes, yet when it came to the question of

saying whether they were "bills of credit" within the meaning of the words as used in the Federal Constitution the Court disposed of the matter very clearly and concisely, and decided that the coupons were in no sense "bills of credit," inasmuch as they were not "designed to circulate in the common transactions of business as money." The Court held that there was nothing in the argument that making the coupons receivable in payment of taxes, etc., would tend to make them circulate from hand to hand as money, for, even if it did, this would fall "far short of their fitness for general circulation in the community as a representative and substitute for money in the common transactions of business, *which is necessary to bring them within the constitutional prohibition against bills of credit*" (p. 285).

The opinion of the Court upon this question is as follows, at page 283 *et seq.*:

> "It is objected, in the first place, that the law and contract, by which the quality of being receivable in payment of taxes to the State is imputed to the coupons, is itself in violation of that clause of the Constitution of the United States, Art. I., Sec. 10, which declares that no State shall 'emit bills of credit,' and is, therefore, void.

" The coupons in question are in the ordinary form, and one of them reads as follows :

" ' Receivable at and after maturity for all taxes, debts and demands due the State.

" ' The Commonwealth of Virginia will pay the bearer thirty dollars interest, due 1st January, 1884, on bond No. 2731.

" ' Coupon No. 20.

" ' GEO. RYE, Treasurer.'

" It is contended that this is a bill of credit in the sense of the Constitution, because, being receivable in payment of debts due the State and negotiable by delivery merely, it was intended to pass from hand to hand and circulate as money.

" The meaning of the term ' bills of credit,' as used in the Constitution, has been settled by decisions of this Court. By a sound rule of interpretation it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the States, and in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence, in consequence of unrestrained issues, by the Colonial and State governments, of paper money based alone upon credit. The definition thus deduced was not founded on the abstract meaning of the words, so as to include everything

in the nature of an obligation to pay money, reposing on the public faith, and subject to future redemption, but was limited to those particular forms of evidences of debt which had been so abused to the detriment of both private and public interests. Accordingly, Chief-Justice MARSHALL, in Craig vs. Missouri, 4 Pet., 410, 432, said, that 'bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society.' This definition was made more exact by merely expressing, however, its implications, in Briscoe vs. The Bank of Kentucky, 11 Pet., 257, 314, where it was said: 'The definition, then, which does include all classes of bills of credit, emitted by the colonies or states, is a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money.' And again, p. 318: 'To constitute a bill of credit, within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life.' The definition was repeated in Darrington vs. The Bank of Alabama, 13 How., 12.

"It is very plain to us that the coupons in question are not embraced within these terms. They are not bills of credit in the

sense of this constitutional prohibition. They are issued by the State, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the State, but they were not emitted by the State in the sense in which a government emits its treasury notes, or a bank its bank notes—a circulating medium or paper currency—as a substitute for money. *And there is nothing on the face of the instruments, nor in their form or nature, nor in the terms of the law which au horized their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate, in the common transactions of business, as money, nor that, in fact, they were so used.* The only feature relied on to show such a design or to prove such a use is that they are made receivable in payment of taxes and other dues to the State. From this it is argued that they would obtain such a circulation from hand to hand, as money, as the demand for them, based upon such a quality, would naturally give. But this falls far short of their fitness for general circulation in the community, as a representative and substitute for money in the common transactions of business, which is necessary to bring them within the constitutional prohibition against bills of credit. The notes of the Bank of the State of Arkansas, which were the subject of controversy

in Woodruff vs. Trapnall, 10 How., 190, were, by law, receivable by the State in payment of all dues to it, and this circumstance was not supposed to make them bills of credit. It is true, however, that in that case it was held that they were not so because they were not issued by the State and in its name, although the entire stock of the bank was owned by the State, which furnished the whole capital and was entitled to all the profits. In this case the coupons were issued by the State of Virginia and in its name, and were obligations based on its credit, and which it had agreed, as one mode of redemption, to receive in payment of all dues to itself in the hands of any holder; but they were not issued as and for money, nor was this quality impressed upon them to fit them for use as money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance, by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the State treasury and the taxpayers. They do not become receivable in payment of taxes until they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all."

In Craig vs. State of Missouri, 4 Pet., 410, 431, Chief-Justice MARSHALL said:

> "In its enlarged, and perhaps its literal, sense, the term 'bill of credit' may comprehend any instrument by which a State engages to pay money at a future day, thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood."

In Pagaud vs. The State of Mississippi, 13 Miss., 491, it was said:

> "The words 'bill of credit' as used in the Constitution of the United States mean 'a paper medium intended to circulate between

individuals, and between Government and individuals, as money, for the ordinary purposes of society.'

"Auditor's warrants, issued under the law of this State, making it the duty 'of the Auditor of Public Accounts to examine, settle and audit all accounts, claims or demands whatsoever, against the State, arising under any act or resolution of the Legislature, and to grant to every claimant authorized to receive the same, a warrant on the State treasury' (H. & H., 270), are not bills of credit, within the prohibited sense of the term; *even though such warrants may have been sometimes used by individual holders as a circulating medium, and a substitute for paper money*" (Syllabus).

See, also,

Gowen vs. Shute, 4 Baxter (Tenn.) 57.
Central Bank of Georgia vs. Little, 11 Ga., 346.

We learn from *Poindexter vs. Greenhow*, *supra*, that evidences of indebtedness issued by a State are not to be considered bills of credit because they are payable to bearer, pass from hand to hand, and are receivable in payment of taxes and of all dues or debts to the State. We learn from the definition given by Chief-Justice MARSHALL that "the word 'emit' is never employed in describing those contracts

by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use."

What, then, is necessary to constitute a prohibited emission of bills of credit? There must be the issuance by a State of its paper evidences of indebtedness, redeemable at a future day, which are *not* issued for services actually received, or for money borrowed for present use, but which are issued with the intention and design *to circulate through the community for its ordinary purposes* as money.

Now let us apply this definition to the treasury warrants issued by the State of Texas, and now claimed to be bills of credit. In the first place, they were issued for services rendered, or, what is legally equivalent thereto, for property received or labor done. They were issued in each case in virtue of legislative appropriations to pay them, and they were issued to persons who, before receiving them, were already creditors of the State for services or other things of value actually received by the State. They were payable immediately on presentation to the Treasurer and when paid were canceled. Hence, the negative mark or element in the definition of a prohibited

bill of credit is wanting, and this is fatal to the State's case. The negative element is an important part of the definition. It was not the intention of the framers of the Constitution to interfere, in the least degree, with the power of a sovereign State to borrow money, or, what is the same thing, to run the government on credit, to create debts for services rendered, etc., and to issue evidences of indebtedness therefor in any form or denomination she sees fit to adopt. The point we make is illustrated by the case of *Craig vs. Missouri*, 4 Peters, 410. In that case the loan certificates, the issuance of which was held to constitute the emission of bills of credit, were not issued for services rendered or things bought by the State. The person to whom they were issued had not rendered any services to the State, or supplied her with something she needed. He was not a creditor of the State. On the contrary, he became her debtor on receiving the certificates, and gave his promissory note therefor. It was manifest that the sole design and purpose of the issuance of the loan certificates was to put them in circulation among the people for ordinary purposes, as money. The distinction between that case and the one now be-

fore the Court is obvious, and has been already sufficiently pointed out.

Let us next apply that element of the definition which relates to the design and intention of the Legislature. It is to be remembered that an unconstitutional intention or design on the part of the Legislature is never presumed. Its existence can be inferred only when the inference is necessary and unavoidable. Now, what is there disclosed by the record in this cause which renders necessary and unavoidable the inference, or which compels the conclusion, that the treasury warrants issued during the war to represent actual indebtedness of the State were issued with the intention that they should circulate as money among the people in their ordinary transactions with each other? There is absolutely nothing in the record which shows that the Legislature intended or designed that those warrants should serve the people as money and be used by them as a circulating medium in their dealings with each other. It is not sufficient to point to laws providing for the receipt of these warrants in payment of debts due to the State and for their disbursement in payment of debts by the State. There is no necessary connection, either of

design or effect, between such legislation and an intention to make the warrants circulate among the people as money in their ordinary transactions. The laws in question relate solely to transactions between the State and her debtors and creditors. Nor does the existence of laws authorizing the issuance of warrants payable to bearer and in small denominations compel the conclusion that it was designed to keep them in circulation as money among the people. It may well have been that the only object of such legislation was to facilitate the retirement of the warrants through payment with them of taxes and other debts due the State (Ramsey vs. Cox, 28 Ark., 366). If the messages of Governors and the reports of Comptrollers, offered in evidence by the State, are considered, it will be seen that her financial policy was founded on the belief that, if the taxes were about equal to the indebtedness she was incurring and issuing warrants for, she could, by making them receivable for taxes, take up the warrants in collecting her taxes. This is inconsistent with an intention to have her warrants constitute a part of the permanent currency or money of the State. We submit that the existence of the unlawful inten-

tion or design, essential to the State's case, has not been shown beyond a reasonable doubt, and, therefore, that the ground of invalidity now under discussion has not been established.

The case of *Braggs vs. Tuffts* (49 Ark., 554), relied on by the State, differs so materially from the case now before the Court that it is entitled to no consideration as authority or precedent. It arose out of a petition for a *mandamus* by Tuffts, presented in 1887, to compel Bragg, a tax collector, to receive in payment of taxes certain treasury warrants issued in 1861 and 1862. The warrants tendered were of the denomination of $1, $5 and $10, and had been issued not only for civil expenses, but also on account of the Arkansas *war* bonds and of expenses incurred by the *military* board. The Court found that the warrants were null and void, because issued under an ordinance of a convention which had been called solely for the purpose of considering what course the State of Arkansas should take in the political crisis, and which had no authority whatever to pass the revenue law providing for the warrants in question. This finding was sufficient to dispose of the case, and the Court need have gone no further. But it further found that the ordinance of May 28, 1861,

under which the warrants were issued, "was essentially a war measure, and its provisions are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the convention intended them as a whole, and if all could not be carried into effect the convention would not pass the residue independently." The ordinance under which the warrants were issued was accordingly declared to be invalid in its entirety, and again it became entirely unnecessary to determine whether or not the warrants were bills of credit. Hence, what was said on that branch of the case should be considered as *obiter dicta.* The Court then took up the question whether the warrants were bills of credit. The following remarks are as applicable to our case as anything contained in the opinion:

> "The legislative intent must be gathered from the terms of the act, which authorizes their issue. It is not sufficient that individual holders have occasionally used the paper as currency in the ordinary transactions of business. Mere acknowledgments of indebtedness by a State, either for borrowed money or services rendered,

> do not fall within the description of bills of credit, provided they are not intended to be put into circulation in the community as money " (p. 162).

If we are to go to Arkansas for the law of this case, we will find it in *Ramsey vs. Cox*, 28 Ark., 366. That case fully supports our contention that the issuance of treasury warrants, payable to bearer, in small denominations, and making them receivable in payment of taxes and all debts due the State, do not evidence a design to have them circulate as money among the people in their ordinary business transactions, and, hence, do not constitute a prohibited emission of bills of credit. So far as the charge now under discussion is concerned, that case is directly against the State, and fully supports the contention of defendants. The question involved in *Ramsey vs. Cox* was the validity of an issuance of treasury certificates or warrants, under legislation providing for their issuance in small denominations, and making them receivable for all taxes and all debts due the State. Of the character of these treasury certificates the Court said: " From these several acts it will be seen that treasury certificates are receivable for

State taxes. They were issued to be used by the persons to whom due, 'or bearer,' and in small denominations, and on bank-note paper, that they might be conveniently used by the people generally for that purpose" (p. 368). The decision upon the charge that the treasury certificates constituted bills of credit is as follows:

> "It has been suggested that these certificates were issued in violation of the Constitution of the United States, and that this section of our Constitution and the legislative acts above quoted, as interpreted, under and by virtue of which they were issued and made receivable, etc., are repugnant thereto. If so, it must be because said certificates are bills of credit, or are made a legal tender. The emission of bills of credit is defined to be the 'issuing of paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day' (4 Kent Com., 408; 2 Story on Const., Secs. 1358–70; *Craig et al vs. State of Missouri*, 4 Pet., 431).
>
> "These certificates were not issued to circulate through the community, for its ordinary purposes, as money; but in every case they were issued as evidences of indebtedness on the part of the State to those to whom they were issued. We see nothing in this to give them the character of bills of

credit. Nor, we apprehend, does their circulation among the people on account of their value in the payment of taxes give them that character.

"Are these certificates made legal tender, etc.? We think not. They are made receivable merely in satisfaction of salary, fees, etc., of officers. The State Government is not bound to pay her officers or public servants any specified amount or character of salary, or to allow them to collect of her citizens any specified amount or kind of fees for their services, unless the same be fixed by the Constitution of the State, which is not the case here. The matter of compensation is subject entirely to the control of the people, or the control of the Legislature when not inhibited by the people in their Constitution. Officers must exercise the privileges or franchises of their offices for the kind and amount of pay that the lawmakers may prescribe, or resign their positions."

We submit that the defendant in error can find no aid or comfort in the jurisprudence of Arkansas.

VI.

REGARDLESS OF THE FORM OF THE WARRANTS AND THE VALIDITY OF THE ACTS OF THE LEGISLATURE ASSAILED BY THE COURT OF CIVIL APPEALS, THE WARRANTS SURRENDERED TO THE STATE BY THE RAILROAD COMPANIES REPRESENTED VALID OBLIGATIONS OF THE STATE, AND THEIR DELIVERY TO AND ACCEPTANCE BY THE STATE WERE LAWFUL PAYMENTS IN EXECUTION OF THE CONTRACT.

It is important to clearly understand and bear in mind, throughout, the precise ground of the ruling of the Court of Civil Appeals, upon which its judgment is based, and the effect of such ruling upon other issues previously in the case. All questions respecting the issuance of warrants or the enactment of laws in aid of the so-called rebellion are eliminated by the decision of the Court of Civil Appeals. So also is eliminated all question respecting the purposes for which the warrants were issued. The decision is necessarily based upon the assumption that the appropriations for which the warrants were issued were made for lawful purposes only. *It deals only with the form of the orders drawn by the Comptroller upon the Treasurer for the pay-*

ment of appropriations duly made by the Legislature for lawful purposes.

The proposition necessarily involved in the holding of the Court of Civil Appeals is that the fact (if it be a fact) that the evidence of a valid indebtedness is illegal in form suffices to invalidate and render null the subsequent payment of this valid indebtedness, and the cancellation of the alleged illegal evidences thereof.

Take a concrete example: Suppose the State of Texas owed a judge one hundred dollars on account of his salary, and issued to him a warrant under the same laws pursuant to which the warrants now attacked were issued. Suppose the judge tendered the warrant or warrants (which the State claims must be considered bills of credit) to the tax collector, or some other proper officer of the State, who accepted the same in payment of a hundred dollars of taxes, or some other debt due the State, and gave the State's receipt therefor, the officer acting under authority of the laws cited by plaintiff, directing the receipt of treasury warrants in payment of taxes and other debts due the State. Is this Court prepared to hold that, after the war, the State could disavow the transaction, treat it as

an absolute nullity, and recover from the judge the taxes or the debt to discharge which his warrants had been accepted and canceled? If not, then we ask the Court to consider whether there is any essential difference between the supposed case and the one at bar. The legal proposition upon which the contention of the State is essentially based is that the mere fact of the illegality of the form of the evidence of an indebtedness of the State, no matter how lawful and valid the indebtedness, is sufficient to render absolutely null a transaction involving the use of the illegal evidence of the debt, but resulting simply in the State discharging her valid indebtedness by giving a discharge of an equal amount of indebtedness owing to her. If this proposition is sound it covers the supposed case, and it strikes with nullity all payments of taxes or land-office fees or other debts due the State, made in treasury warrants, and practically every other financial transaction made between the State of Texas and her citizens during the four years of the war.

The State Government during the war owed to the people of the State the duty of preserving the peace and good order of society, of protecting

life and property, providing for the transfer of property, the enforcement of rights and the redress of wrongs, and the performance of the other functions of a civilized government. In the second place, the performance of these duties entailed the necessity of employing and compensating sheriffs, police and other public officers, judges, clerks of court, magistrates, recorders, etc.; it involved the necessity of providing office force for the administration of the fiscal affairs of the State, and the collection and disbursement of the public revenues; it rendered necessary provision for all the usual governmental machinery needed for the administration of the internal affairs of a great State. In the third place, the employment of the officers and agents necessary to enable the State to perform its proper functions involved the necessity of paying salaries, and the ordinary administration of government involved, of course, the constant incurring of expenses and the creation of debts and obligations on the part of the State. Now, the first step in the payment of salaries or other expenses of the State, after legislative appropriation, was the drawing of treasury warrants by the Comptroller. It is an historical fact

that there was practically no gold or silver or United States currency in circulation in the Southern States during the war. Hence the treasury warrants could not be immediately paid in money, and remained outstanding. If the warrants were of no value no one would take them, and the State Government would come to an end. The effect of the legislation in question and its obvious purpose were to give value to these warrants and to provide for their payment, and the object and desire of the Legislature in enacting the laws in question, so far from being reprehensible, were commendable and absolutely necessary to enable the government to accomplish the only purpose for whcih it had a right to exist; namely, to provide and maintain the necessary governmental means and agencies for the protection of the lives and property of its citizens.

In the Bond Debt Cases, 12 Sou. Car., 200, it was held that "bonds of the State issued in payment of outstanding bills receivable, for which the State had received value, are valid and binding obligations, even though such bills should be considered bills of credit. The Constitution of the United States does not prohibit a State from

paying bills of credit" (Syllabus). The Court in the opinion said at page 284 :

> " The next ground upon which this act is claimed to be unconstitutional is that bills receivable are bills of credit, and are, therefore, within the prohibition contained in Article I., Section 10, of the Constitution of the United States, which declares that ' no State shall * * * emit bills of credit.' Whether bills receivable are bills of credit within the meaning of that clause of the Constitution of the United States it is not important for us now to consider, inasmuch as such a question is, in our judgment, wholly immaterial to the inquiry in which we are engaged. It will be observed that the prohibition is against the issue of such bills—not against their payment. If, therefore, these bills are of the character claimed for them, it may be that they would be invalid and worthless as legal obligations in the hands of those who happened to hold them, and that if the question were whether the payment of such bills could be enforced, or whether the officers of the State should be restrained from issuing them, the position taken by the attorney-general would be entitled to great consideration. Such, however, is not the question. It is not, and cannot be, denied that these bills were issued by the proper officers of the State, under an act of the gen-

eral assembly purporting to confer authority for so doing, and that the State received full value for them. When the state government was reorganized in 1868, they found these bills outstanding, and, even though it should be admitted that they were unconstitutional in form, they nevertheless represented valid and *bona fide* indebtedness of the state. If the state saw fit, voluntarily, to recognize such indebtedness, even though it stood in a form which affected its legal obligation, and provided for paying it or funding it in a form to which there could be no constitutional objection, we cannot conceive how such an act on the part of the state, in conformity, as it was to the plainest dictates of common honesty, can be regarded as in violation of the Constitution of the United States. So far from emitting or issuing paper supposed to be within the prohibition of that Constitution, the state, on the contrary, made provision for the withdrawal of such paper from circulation, and replacing it with other evidences of indebtedness in a form which would not be amenable to such constitutional objection."

It is important to notice that the Court below does not once refer to any specific acts of the Texas Legislature which show that the treasury warrants were intended to circulate as money.

In the opinion it was said: "We find that the defendant made the payments pleaded in its answer, but that such payments as were made in State warrants were treasury warrants *intended* by certain acts of the Legislature of the State to circulate as money" (Record, p. 212). No more definite statement as to what acts were referred to is given by the Court.

Assuming for the purposes of argument that the acts were unconstitutional, does an act of the Legislature which attempts to make a treasury warrant good as money, which attempts to make a treasury warrant good as legal tender, and by reason of its unconstitutionality makes such treasury warrants null and void for such purposes, make that warrant, which in its inception was proper and legal and not issued for the purpose of circulating as money, void for all purposes. In other words, is the warrant, which might possibly be void if attempted to be used for the purposes mentioned in the acts referred to by the State Court and industriously collated upon the brief of defendant in error, void when used for an entirely proper and legitimate purpose in no way prohibited by the Constitution? That is, it was always open to the State to say,

as it has done in the Acts of 1861, 1863 and 1864, that, in the case of mutual debts between itself and its creditors, the latter could offset the treasury warrants held by them against their indebtedness to the State, and such right cannot be defeated, and any completed act under such an offer cannot be considered void and of no effect simply because of another statute declaring that treasury warrants can be used for another purpose which the State Court says is in violation of the State Constitution. To put the situation in another form, the acts referred to by the State Court as tending to show that the treasury warrants were intended to circulate as money may be unconstitutional and the use of the treasury warrants for the purposes indicated by such acts may be unconstitutional and the warrants when tendered for any such purpose may be null and void; but, because of this such treasury warrants are not void for all purposes, and, when used for a proper and legitimate purpose not in violation of the State Constitution, are as good as if the laws referred to by the State Court had never been passed.

We desire to call the attention of the Court to the fact that the statutes which are said to be

unconstitutional all relate to the use as money of treasury warrants which have been or may be issued. The vice sought to be corrected by the Constitution was the "issuing" of warrants to be circulated as money, and not to the use for money of warrants already issued. To provide that warrants properly issued could incidentally be used as money does not seem to fall within the meaning of the words used in the Constitution to prohibit the "issue" of warrants to circulate as money. While no one perhaps could be compelled to receive such warrants as money because of the unconstitutional character of the legislation which should try to effect such result, yet it is clear that the warrants would not be rendered void when used for purposes which were perfectly legitimate and were not in violation of any provision of the Constitution. An examination of the act most relied upon by defendant in error, and found at the bottom of page 25 of its brief, simply enacts that a public officer who shall HAVE received treasury warrants shall disburse the same as money *if the persons entitled to have a disbursement will receive them as money* (Acts of 1862, p. 38). It is to be observed that the act refers to warrants

previously issued, and that there is nothing obligatory about receiving the warrants as money. They are not made legal tender, but any person who wishes to receive them as money can do so. It is further to be observed that treasury warrants, when received by a public officer in adjusting a balance due to any one entitled to a disbursement, are not to be reissued, which tends to show that they were not to circulate as money. Certainly a law which clearly relates to previously issued warrants, and merely declares that such a warrant can be disbursed as money if anybody is willing to so receive it, can hardly be said to come within the prohibition of a clause of a Constitution which says that "in no case shall the Legislature have the power to *issue* treasury warrants * * * intended to circulate as money."

Our position is that the treasury warrants in this case were issued by the State, as they always had been before and always have been since, for the purpose of carrying on the business of the State. They were orders issued by the Comptroller upon the Treasurer, and were simply evidence of the indebtedness of the State to be paid whenever presented to the Treasurer. At the

particular time in question the State had no money to pay said warrants, but it said to the railroads, in the Acts of 1861, 1863 and 1864, " You are indebted to me upon the school-fund loans, and I am indebted to you upon my treasury warrants which you hold. You may offset the one indebtedness against the other."

Such was the contract between the railroad companies and the State of Texas, and, as it seems to us, such contract and the rights acquired thereunder cannot be set aside and the treasury warrants used to pay the school-fund loans declared unconstitutional and void, as being issued to circulate as money, by saying that the Legislature passed some act, in no way connected with the transactions here, about the time that the treasury warrants were paid, enacting that treasury warrants theretofore issued might be used as money if anybody would take them as such.

We, however, insist that not a treasury warrant paid by the railroads to the State on account of the school-fund loans has been shown by the evidence in this case to have been issued in violation of the provision of the State Constitution, which enacts that

> " in no case shall the Legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money" (Art. VII., Sec. 8, Constitution of Texas of 1845).

There has not yet been pointed out in all the legislation of Texas prior to or since the time of the payment of the treasury warrants in question a single statute authorizing the issue of treasury warrants to circulate as money. The Court below did not attempt to do so, but simply contented itself with the statement that it was the purpose of " various acts of the Legislature of the State during the period of the war " to give to the warrants issued at that time a standing and character as money (Rec., p. 214). We venture to say after an examination of the Texas statutes that there is not a law of the State authorizing the issue of treasury warrants which provides, or attempts to provide, that they shall circulate as money.

As we have before pointed out, the only statute which would violate this provision of the State Constitution is a law which authorized the issue of treasury warrants, and did so with the intention that they should circulate as money. It is possible that warrants issued under such a law

might be void, as the law would perhaps be unconstitutional, but surely warrants issued under a law which did not intend at the time of its passage that warrants issued thereunder should circulate as money could not be vitiated by reason of the passage of an act subsequent to the law under which the warrants were issued, but prior to the actual issue of the warrants, which simply permitted the officers of the State authorized to receive public money to receive such warrants "as money," and disburse them "as money" if the person entitled to have a disbursement will receive them "as money."

We have stated the case of the State in a far stronger form than has been proved in the record, but even in this form, as it seems to us, no case is made under which the treasury warrants could be said to be in violation of the Constitution. In other words, State treasury warrants cannot be said to be void and unconstitutional unless the act under which they are issued is in violation of the State Constitution, and the law under which a warrant is issued (if not unconstitutional at the time of its passage) cannot be made so by a subsequent act which might attempt to make warrants issued under the first

and prior act circulate as money. Now, there has been no attempt to show that any law under which any warrant delivered and paid to the State by the railroads was issued provided that such warrant should circulate as money, and the entire contention of the State of Texas, that these warrants were void and in violation of the State Constitution, is based upon the fact that a law was passed in 1862 authorizing public officers to receive warrants issued under some other law "as money, except when expressly prohibited by some other law," and to pay out warrants received by them prior to the passage of the Act of 1862 as money if the parties entitled to a disbursement should be willing to receive them as money.

It is very clear from its terms that the law of 1862 never intended to make treasury warrants previously issued under some other law, or subsequently issued pursuant to the provisions of other acts of the Legislature, legal tender. The whole character of the act shows that it refers simply to the acts of its disbursing and receiving officers, and permits such officers to disburse such warrants if the party entitled to receive

such disbursement is willing to take warrants and allows its receiving officers to receive the evidence of its own indebtedness as a set-off against indebtedness to it. These provisions would seem very far from making warrants authorized by some other act of the Legislature legal tender, and do not disclose any intention to make such warrants circulate as money among the general public, which is, we take it, the only meaning in which the words are used in the State Constitution. The utmost that can possibly be said of the Act of 1862 is that it provided for the use of warrants for purposes prohibited by the Constitution, and that it was therefore unconstitutional; but, as we have said more than once, that cannot affect warrants issued under some other act, and used for purposes in no way falling within the ban of the provisions of the State Constitution.

Assuming that the treasury warrants were void as being in violation of the State Constitution, which prohibited the issue of treasury warrants to circulate as money, it is not at all plain that it could affect the contracts in this suit. No one disputes that at the time these treasury warrants were paid to the State by the railroad companies

they had a market value of ten cents upon a dollar (Record, p. 166). Such value existed without any regard to whether they had been issued in violation of the State Constitution or not. The railroad companies could have sold them for this much at least. They were things of value. The delivery of them to the State was the surrender to it of articles of a recognized money value, and they had been received by the railroad company at their par value. The consideration of the contract on the part of the railway companies was two-fold—it was the giving of transportation on its railroad and receiving therefor treasury warrants at their face value instead of at their true market value, and the surrender to the State of the evidence of its indebtedness, which they could have sold for at least ten cents on a dollar.

There was, therefore, a perfectly good consideration rendered by the railroad companies, whether the treasury warrants were void or not, and whether they were issued to circulate as money or not ; and, if the value of the consideration performed by one party remains and is unaffected one way or the other by the constitutionality thereof, it is not plain how the contract itself can be affected by the question of whether

the consideration of the contract was void, as being in violation of the State Constitution.

It would certainly seem as if a creditor was entitled to determine in what his debt should be paid, and, having once so determined, must be bound thereby. If a creditor chooses to receive something other than money in settlement of what is due him, it is not clear why he should not do so, and it would seem to be immaterial whether the medium of payment selected by him was illegal, so long as he preferred that the payment should be made therein.

In Planters' Bank vs. Union Bank, 16 Wall., 483, the Court below instructed the jury that payment of a claim in Confederate notes was not a good payment. In this court it was not necessary to pass upon the question, but the remarks made by Mr. Justice STRONG at page 494 would seem to imply that a creditor had a right to accept payment in anything he saw fit, without regard to its illegality. It was there said:

> "It might be difficult to maintain, if the military authorities were clothed with the rights of creditors—that is, if they had succeeded to the position and title of the plaintiffs—that they could not determine

> what funds they would receive in payment of the balance on the defendant's books to the credit of the plaintiffs. It is not perceived why they could not accept Confederate notes in discharge of a debt which had become due to them."

If the payment of a creditor in Confederate notes is a sufficient payment of the debt, provided the creditor selects such medium of payment, it would seem as if the payment in treasury warrants was equally a discharge of the debt in a case where the creditor had chosen such manner of payment.

No objection can be taken to the railroad companies having performed the conditions precedent required by the Acts of 1861, 1863 and 1864, and to the subsequent acceptance of such performance by the act of the State in giving credit to the railroad companies for the State treasury warrants delivered by them to the State in payment and satisfaction of the interest upon the school-fund loans.

It is, further, beyond question that the railroad companies rendered a good and valuable consideration to the State in return for the credit given them by the State on account of the school-fund loans. The situation was this: The

State treasury warrants, at the times in question, were worth considerably below par. They had a certain value, but it was below their face value. The State, in effect, said to the railroads that, if they would receive these warrants from their shippers and passengers at par instead of at their actual value, it would also receive the warrants from them at par instead of at their actual value. It must be constantly borne in mind that, during all this time, these State warrants had an actual market value. It was at least ten cents on the dollar (Rec., p. 166). The consideration of this contract, therefore, performed by the railroad companies, consisted (1) in having, at the request of the State, given transportation at a greatly-reduced rate by receiving treasury warrants at par instead of at their market value. That is to say, if the regular rate established by law for a shipment of freight offered to the railroad was one dollar ($1) per thousand pounds, the railroad company received and transported such freight for ten cents a thousand pounds. (2) A further consideration performed by the railroad companies was the surrender to the State of its evidences of indebtedness, when the railroads could

have sold them and realized therefrom at least one-tenth of their face value.

The consideration, therefore, of this contract was good and valuable, and its virtue in forming part of a perfect contract between the railroads and the State would seem unaffected by any question of whether the treasury warrants paid by the railroads to the State were void, as being issued in violation of the State Constitution. Even if they were, yet such warrants were of a definite market value, and their surrender to the State was a surrender of things of value, and, in consideration of such surrender, the State agreed to give the railroad companies credit on account of the school-fund loans to them, and when the other branch of the consideration of this contract is considered—viz., the giving of transportation at the established rates and taking these treasury warrants at ten times their market value in return therefor—it would seem as if nothing further need be said to show that the consideration of this contract was ample and sufficient, and entirely unaffected by the question whether the treasury warrants were void, as being issued in violation of the State Constitution.

Whether the warrants were unconstitutional or not, they had a market value and it was a damage to the railroads to receive them at par instead of at their actual value, and also a damage to surrender them to the State. Such damage, therefore, constituted a good consideration for the contract between the State and the railroads and is entirely unaffected by the constitutionality or unconstitutionality of the warrants.

In Hendrick vs. Lindsay, 93 U. S., 143, 148, the Court said:

> "Damage to the promisee constitutes as good a consideration as benefit to the promisor. In Pillan vs. Van Mierop, 3 Burr., 1663, the Court say: 'Any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising.' This rule is sustained by a long series of adjudged cases."

In the case of Violett vs. Patton, 5 Cr., 142, 150, it was said by Chief-Justice MARSHALL that:

> "To constitute a consideration it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows

> from the person to whom it is made, and that the promise is the inducement to the transaction."

In Townsley vs. Sumrall, 2 Pet., 170, 182, the Court, speaking through Mr. Justice STORY, concisely stated the rule as follows:

> "Damage to the promisee constitutes as good a consideration as benefit to the promisor."

The present case certainly comes within the rule indicated in the authorities just referred to, and though possibly it might be said that the State of Texas had received no benefit from the surrender to it of its evidences of indebtedness because the treasury warrants were unconstitutional, and therefore null and void, yet the damage to the promisees (the railroad companies) induced by and resulting from the promise and offer of the State was very clear and two-fold in its nature. It consisted (1) of the furnishing of transportation at about one-tenth of the rate allowed by law, and (2) of the surrender of treasury warrants which had a definite market value, and from which the railroads would have realized at least one-tenth of their face value if

they had not delivered them to the State of Texas under the terms of its promise.

In support of our proposition that, even if the treasury warrants were void because in violation of the State Constitution (which we deny), they still had a money value, and therefore constituted a valuable consideration for a contract, we refer the Court to Thorington vs. Smith, 8 Wall., 1, where it was substantially held that Confederate treasury notes, though issued in aid of the Rebellion, and therefore void, had a "certain contingent value," and therefore constituted a good consideration for a contract for the sale of land, inasmuch as such contract had nothing to do in itself with aiding and promoting the Rebellion.

The facts in the Thorington case are as follows: Thorington in 1864 sold to Smith a piece of land adjoining the City of Montgomery, Alabama. The price agreed to be paid for the land was $45,000. Of this sum $35,000 in Confederate States treasury notes were paid at the execution of the deed, and for the residue a note was executed containing a vendor's lien on the property for the amount thereof. After the war Thorington filed a bill to enforce his vendor's lien, claiming the $10,000 in the money then current—

to wit, lawful money of the United States. The answer set up the circumstances at the time the contract was entered into and insisted that the note given for the $10,000 was to be discharged in Confederate notes, and that, therefore, the vendor was not entitled to any relief in a court of the United States.

A witness, who negotiated the sale, was offered to show that it was understood and agreed that the note should be paid in Confederate notes, as the $35,000 had been. The Court admitted the evidence to prove that the note was, in fact, made for payment in Confederate notes, and *then dismissed the bill upon the ground that the contract was illegal, because to be paid in such notes.*

One of the questions presented to this Court, and answered in the affirmative, was:

> "Can a contract for the payment of Confederate notes, made during the late Rebellion between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?"

In the consideration of this matter the Court said, at page 11, as follows:

> "To the extent, then, of actual supremacy, however unlawfully gained, in all

matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity, but a duty. Without such obedience civil order was impossible.

"It was by this government exercising its power throughout an immense territory that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, *these notes were nullities*, for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only 'after the ratification of a treaty of peace between the Confederate States and the United States of America.' While the war lasted, however, *they had a certain contingent value* and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

"It seems to follow as a necessary consequence from this actual supremacy of the

insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. *Contracts stipulating for payments in this currency cannot be regarded, for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame except when proved to have been entered into with actual intent to further invasion or insurrection.* We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation. The first question, therefore, must receive an affirmative answer."

In Hannauer vs. Woodruff, 10 Wall., 482, a somewhat similar question arose, and this Court was equally divided; but subsequently and in the case of Delmas vs. Insurance Company, 14 Wall., 655, the Thorington case was approved, and the

somewhat conflicting decision in the Hannauer case, arising from the equal division not only of this Court, but of the Court below, was disapproved.

The facts in the Hannauer case are of much interest upon this branch of the discussion. Woodruff made and delivered to Hannauer a promissory note, and the only consideration of the note was certain bonds issued by an ordinance of the convention which attempted to carry the State of Arkansas ont of the Federal Union by what is called the "Secession Ordinance." These bonds were issued for the purpose of supporting the war, and were styled " War Bonds " on their face, and the purpose of their issue was well known to both parties to the note.

The bonds had at the time of the transaction a value not much below their par value on their face, say ten per cent., at Memphis and in Arkansas.

The war bonds received by Woodruff were not used or intended to be used by him in support of the war.

Upon these facts a question of law arose as to which the judges of this Court and of the Court below were divided in opinion, to wit :

" Was the consideration of the note void on the ground of public policy, so that no action could be sustained on it in the Federal courts ? "

The view of one-half of the judges who sat in this case seems to have been that, though the war bonds were null and void as having been issued in aid of the Rebellion, yet they had a money value, and therefore constituted a good consideration for a contract which had nothing to do with the support of the Rebellion, and the view of such half of the judges sitting in this case is apparently sustained by the subsequent case of Delmas vs. Insurance Company, 14 Wall., 661, 665, where it was said by Mr. Justice MILLER at page 665 :

> " In regard to the first of these propositions this Court has decided in the case of Thorington vs. Smith that a contract was not void because payable in Confederate money ; and, notwithstanding the apparent division of opinion on this question in the case of Hannauer vs. Woodruff, we are of opinion that, on the general principle announced in Thorington vs. Smith, the notes of the Confederacy actually circulating as money at the time a contract was made may constitute a valid consideration for such contract."

Perhaps the last decision of this Court upon the question is Effinger vs. Kenney, 115 U. S., 566, when Mr. Justice FIELD delivered the opinion of the Court and said at page 573:

> " It would seem, therefore, to be no longer open to question that, where contracts were made in the insurgent States during the war between residents of those States, with reference to Confederate notes as a standard of value, *and were not designed to aid the insurrectionary government*, they may be enforced in our courts."

Again, at page 575, it was brought out in unmistakable language that, although the Confederate notes were unlawful and illegal, yet as they had a value they could constitute a sufficient consideration for a contract. On this point it was said:

> " The treasury notes of the Confederate States constituted under the laws of the United States neither lawful property nor lawful currency. They were the promises of an insurgent and revolutionary organization, payable only when its success should be established by a treaty of peace with the United States. Of the value of such promises the National Courts will make no inquiry, *except as they were receivable in contracts not designed to further the insurrec-*

tion. * * * Their intrinsic value was nothing, but their exchangeable value, by reason of their enforced circulation, was the estimate of them at the time in lawful money of the United States."

See, also,

The Confederate Note Case, 19 Wall., 548.

Wilmington & Weldon Railroad Co. vs. King, 91 U. S., 3.

Stewart vs. Salamon, 94 U. S., 434.

Cook vs. Lillo, 103 U. S., 792.

Rives vs. Duke, 105 U. S., 132.

In *Dull vs. Gordon*, 24 La. An., 478, plaintiff sought to ignore partial payments made, during the war, in unlawful currency, and to recover the total amount of the debt, but the Court said, at page 479:

"It appears that the five hundred dollars paid on the nineteenth of March, 1864, was in Confederate treasury notes; and it is also probable that the item of seventy dollars was paid in Confederate notes; and it is urged that, because these payments were made in that currency, we cannot allow them as credits. When payment of an obligation has been received by the obligee in Confederate treasury notes the Courts will not interfere; *to the extent of the payment it is an executed contract.*"

We know of no case holding that a party who accepted, without objection or coercion, any paper issued during the war in payment of a debt, had a right, after the war, to repudiate the payment, and recover the debt. Even the Supreme Court of Texas always upheld such transactions prior to this case. In *Van der Hoven vs. Nette, 32 Tex., 183*, it was held that payments accepted in Confederate money without objection could not be avoided on the ground that the plaintiff stood in dread of the so-called rebel authorities, who then threatened all persons who refused to accept Confederate money in the discharge of debts. In *Ritchie vs. Sweet, 32 Tex., 333*, it was held that the payment of a note made before the war with Confederate money during the war, and the surrender of the note upon such payment, was an executed transaction, against which no relief would be afforded.

The case of *Piegzar vs. Twohig, 37 Texas, 225*, is directly in point. A vendor of land accepted, during the war, Confederate money in payment of some of the purchase-money notes. After the war he declined a tender of the balance due after deducting such payments, and refused to perform the contract to convey, unless the whole

amount, including the amount paid in Confederate money, was again paid. The purchaser brought suit for specific performance, and the Court held that the vendor, having accepted Confederate money without objection, was bound thereby, and was compelled to convey the land on payment of the balance after deducting the amount paid in Confederate money. In *Allen vs. Baker, 39 Texas, 220*, it appears that Allen's wife, upon an order from him on Baker, accepted from Baker Confederate money in part payment of Baker's obligation. Allen subsequently died, leaving his widow as executrix and sole legatee under his will. The widow qualified as executrix, and accepted the remainder of the debt in Confederate money. Subsequently she sought to repudiate these payments and recover on the original obligation without allowing credit for the payments in Confederate money. The Court held that she was bound by the payments, and was not entitled to recover. In *Long vs. Walker, 47 Texas, 173*, it was held that a payment in Confederate money was valid, because it was treated by the parties as valid when made. See, also, *Burleson v. Cleveland, 32 Texas, 397; Rodgers vs. Bass, 46 Texas, 505; San Patricio*

County vs. McClane, 44 Texas, 392; Roberts vs. Schultz, 45 Texas, 184; Dull vs. Gordon, 24 La. Ann., 478; Heirs of Brown vs. Jacobs, 24 La. Ann., 526. Authorities might be multiplied from other States to the same effect.

We, therefore, confidently submit that, even if the treasury warrants in this case were null and void as in violation of the State Constitution (which we deny), they at the same time had a money value, and were not being used at the time of these transactions in a way which violated the letter or spirit of the State Constitution, and, therefore, constituted a perfectly good consideration for the contract between the State of Texas and the railroad companies, and the agreement between them was, therefore, not void.

The case of Little Rock vs. National Bank, 98 U. S., 308, is most instructive. The City of Little Rock, Arkansas, in 1867 provided for the issue and redemption of its bonds, which in violation of law were printed upon bank-note paper. By this issue of bonds it obtained the means with which, among other things, it erected many public improvements and paid the salaries of its officers and agents. The city received

these bonds in payment of taxes and other dues, and to some extent reissued them when its occasions required. The value of the bonds diminished from time to time, *until it became merely nominal*, and in 1873 the City Council adopted an ordinance "for the redemption of outstanding city bonds in banknote paper."

The Merchants' National Bank of Little Rock was the lawful holder for value of a large number of overdue bonds of that description issued to other parties in payment of valid claims against the city, and in accordance with the terms of the ordinance surrendered the bonds to the City Council by whom they were canceled. For a portion of the bonds so surrendered the bank received new bonds of the city. For the rest of the surrendered bonds *the city acknowledged its indebtedness by giving the bank credit therefor on the books of the city.*

The bank brought suit against the city upon the new bonds and also to recover the amount which had been credited to the bank upon the books of the city.

The city, among other defenses, pleaded that the bonds surrendered were issued in violation of the statute, and that the credit entered upon

the city books was without authority of law or *valuable consideration.*

The case was tried and the jury returned a verdict in favor of the bank, and the defendant the City of Little Rock sued out a writ of error to this Court, which affirmed the judgment of the Court below.

The lower Court held that the original issue of bonds in 1867 was illegal for much the same reason that it is now claimed by the State of Texas that the Treasury warrants in this case were illegal. This Court held that it made no difference whether the original bonds were legal or illegal, but that their surrender, even in the event that they were illegal, was a good consideration for the credit given by the city to the bank. In the course of his opinion, Mr. Justice HUNT, who delivered the opinion of the Court, which was unanimous, said at page 313:

> " Upon this state of the law the Judge at the Circuit was of the opinion that the original issue of its notes by the City of Little Rock was illegal. It is not necessary that we concur in this view or that we should dissent from it. We have referred to the statutes that the actual position of the parties towards each other might be

understood, and the point on which the decision in favor of the bank was made be appreciated.

" There was evidence that the bonds sued on *and the ledger accounts sued on* were given and allowed on the immediate consideration of the surrender of bonds of the form, character and material first issued by the city. The Court charged as follows, viz.:

" ' That the bonds in suit issued by the defendant in lieu of said bonds on bank-note paper—the last-named bonds having been originally issued under the circumstances above stated for valid debts against the city to other creditors of the city than the plaintiff, and the plaintiff not having been connected with their issue—constitute a valid ground of action against the city, and the city is liable thereon to the plaintiff, although the said city bonds on bank-note paper were of such an appearance and of such a form as to be especially adapted to constitute a circulating medium, and were, in fact, used in and about the city as a local circulating medium in lieu of money.

" ' *There is also a claim against the city for the amount of certain city bonds on bank-note paper surrendered by the plaintiff to the city at its request, for which the city issued no new bonds, but placed the amount of the bonds surrendered by the plaintiff aud destroyed by the city to the credit of the plaintiff on the ledger of the city.* The same prin-

ciples of law apply to this claim as to the claim on the new bonds.' * * *

"We think the charge as quoted was right."

It is not easy to see that any material distinction can be drawn between the present case and the case cited.

In the latter the city claimed that the surrendered bonds were illegal because issued contrary to an express statute, and that the surrender of an illegal bond did not constitute a good consideration for a credit given by the city upon its books to the party surrendering the bonds. In the present case the State claims that the treasury warrants were illegal, because issued in violation of the State Constitution, and that their surrender therefore did not constitute a good consideration for the credit given by the State upon its books to the railroads which surrendered the warrants.

The two cases would seem to be precisely the same, and, as this Court held in the Little Rock Case that the illegality of the bonds did not prevent their surrender from being a good consideration for the credit given by the city upon its books to the party surrendering the bonds, it

would seem to follow that the surrender of the treasury warrants by the railroads constituted a sufficient consideration for the credit given to them therefor upon the State's books, without any regard to whether such treasury warrants were or were not in violation of the State Constitution.

The Supreme Court of Arkansas in the case of Bragg vs. Tuffts, 49 Ark., 554 (a case upon which counsel for the State placed so much reliance as authority for the proposition that these warrants were bills of credit, in which connection we have already discussed it), felt constrained to guard against any implication that it regarded the warrants there involved otherwise than as meritorious and at least moral obligations of the State. In concluding the opinion the Court observed at page 567:

> " Nothing herein, however, must be construed into an expression of opinion that no moral obligation rests upon the Legislature to provide for them [the warrants]. The majority of the claims upon which they were issued are as meritorious as the salaries of the present State officers. And the holder of the warrants ought to be considered as the equitable assignee, *pro*

> *tanto*, of the claims, and subrogated to all the rights and equities of the original claimants."

Would any court of conscience, holding the views expressed by the Arkansas Court, permit the State to repudiate a transaction involving the discharge by it of such moral obligations? It is an established principle of the Roman law that no suit will lie to recover what has been paid or given in discharge of a moral obligation, called, in the nomenclature of the civil law, "natural obligation." For instance, the Civil Code of Louisiana, following the Code Napoleon, defines a natural obligation to be "one which cannot be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice" (Art. 1757); and, in stating the characteristics of a natural obligation (Art. 1759), declares that "no suit will lie to recover what has been paid or given in compliance with a natural obligation." It is an historical fact that the great body of the principles of equity come from the civil law. If a State has issued to a creditor an evidence of indebtedness which turns out to be illegal in form, does it cease to owe the debt? Is it not its duty

to take up the illegal evidence and pay it or issue a valid warrant in its place? Upon what principle of law or equity can the State of Texas treat the honest discharge of her debts as illegal and invalid—an absolute nullity?

We have affirmed, by the Court of Civil Appeals, the extraordinary proposition that the State may repudiate the debts which these warrants were drawn to pay, and recover from one of its creditors a debt canceled at its instance by the surrender and cancellation of the State's own obligations, simply because of the *form* of the paper which the State gave to its creditors. It cannot be denied that the State is to-day morally and legally bound by every warrant it issued, during the war, for lawful purposes. The lawful holder of every treasury warrant issued, during that period, for the payment of salaries of the State's judicial, executive and legislative officers, and for other lawful purposes, has a just and lawful claim against the State to-day. All that exempts the State from liability thereon is its immunity from suit by reason of its sovereign character. But here the State has come into court, and without any reason to

deny its liability is seeking to avoid payments made to it by one of its creditors in this very paper. In other words, it demands from one of its creditors what it claims to be due, and refuses to allow as an offset or credit a debt due by it, and that, too, where the settlement has already been made. The State's indebtedness has been extinguished *pro tanto* by the cancellation of its lawful obligations surrendered by its creditors, and yet it seeks to avoid allowance of credit therefor, and endeavors to have the transaction re-opened.

So we say that, whatever these warrants were in *form*, they were in *fact* lawful evidences of obligations upon the part of the State; and, if it be true that they were dealt in, it was only because the State's Treasurer, on whom they were drawn, and whose duty it was to pay them on demand, was without money with which to pay them; that if the State had met them, as it was legally and morally bound to do, they would not have circulated at all; and the State cannot annul its indebtedness, and render its obligations illegal in the hands of its creditors, by withholding payment and disabling itself

from paying them. The State itself brought about the conditions that forced the warrants to circulate, and by its own conduct drove all lawful money out of circulation and compelled its creditors to use its evidences of indebtedness as best they could.

The railroad companies are not proceeding upon the warrants. They are not asking any relief upon them. All they ask is that the transaction in which they engaged at the instance of the State, and which was deemed by both parties at the time lawful in all respects, and which operated to extinguish the indebtedness of the State to the same extent that their own indebtedness was extinguished, and which was fully executed at the time, be upheld.

FOURTH POINT.

The Act of August 13, 1870, impaired the obligation of the contract between the State of Texas and the railroad companies arising under the Acts of 1861, 1863 and 1864.

By reason of the war the railroad companies had been unable to comply with the conditions of the school-fund loan, and their roads were liable to be sold for noncompliance therewith. To relieve the railroads from this liability the Act of August 13, 1870, was passed. The portion of the law which it is more important to notice is the provision which enacts that any railroad company which is indebted to the State upon loans from the Special School Fund may avoid the sale of its road by the payment into the treasury of the State, on the 1st day of November, 1870, and on the 1st day of May and November in each year thereafter, of six months' interest, and one per cent. towards a sinking fund, upon

> "*the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870.*"

The case turns upon what was due upon the 1st day of May, 1870. The railroads have contended that the amount due upon that date could only be computed by taking the account as it stood upon the books of the State on that day and giving them credit for the treasury warrants surrendered to and canceled by the State under the terms of the Acts of 1861, 1863 and 1864.

The officers of the State have claimed that the proper construction of the Act of August 13, 1870, required them to insist that the amount due upon the 1st day of May, 1870, upon the school-fund loans, could only be arrived at by canceling and disregarding the credit given to the railroads upon the surrender of the treasury warrants and when the railroads tendered their first payment under the Act of August 13, 1870, on the 1st of November, 1870, the Comptroller of the State of Texas, with the concurrence and approval of the Governor thereof, contended that the amount offered by the railroads, which was computed upon the theory that they were entitled to credit for the treasury warrants paid by them was wrong and that the six per cent. interest and one per cent. sinking fund to be paid under the Act of August 13, 1870, should be computed by

disregarding entirely the credit given to the railroads for the treasury warrants paid to the State under the provisions of the Acts of 1861, 1863 and 1864.

This latter construction was, therefore, placed upon this law by the executive officers of the State of Texas, and has now been approved by the highest Court of the State.

Just when the Comptroller with the approval of the Governor and Attorney-General of the State of Texas restated the accounts between the railroads and the State does not clearly appear from the record. The Judge who delivered the opinion of the trial Court has said that "it must be assumed that the accounts were restated and the railroads recharged with the payments made in treasury warrants on May 1, 1870, as that is the date of the entries on the books, and as there is no other evidence of the date of restating these accounts. Hence, the acts mentioned may have referred to the condition of the accounts after they were restated" (Record, p. 68), and has actually found, as a conclusion of fact,

> "that said payments in treasury warrants were charged off the account, and the account of the State with the defendant

railroad company was restated May 1, 1870, so as to ignore said payments in treasury warrants" (Record, p. 71).

Although the record is somewhat obscure upon this point, and even if it is not plain that this finding of the trial Judge is based upon the evidence, yet it is conceded that on November 1, 1870, when the railroads tendered their first payment under the Act of August 13, 1870, the Comptroller, with the approval of the other officers of the State, then in effect restated the account between the railroads and the State, wiped out the credit acquired by the railroads upon the payment of the treasury warrants, recharged them with the amount of the treasury warrants surrendered to the State under the Acts of 1861, 1863 and 1864, and insisted that the interest and sinking fund to be paid under the Act of August 13, 1870, should be paid upon the amount due from the railroads on May 1, 1870, calculated by disregarding such payments in treasury warrants.

Our position is that whether the accounts between the railroads and the State of Texas were actually restated on May 1, 1870, prior to the passage of the Act of August 13, 1870, or subse-

quent to the passage of such act and when the first payment was to be made thereunder on November 1, 1870, the law of August 13, 1870, as construed by the executive officers and the Courts of the State of Texas, clearly and obviously impairs the obligation of the contract between the State of Texas and the railroad companies, which arose under the Laws of 1861, 1863 and 1864.

If this Court should agree with the trial Court that the accounts between the railroads and the State of Texas were restated by the Comptroller on May 1, 1870, so as to cancel and exclude the payments made by the railroads in treasury warrants, and that the law of August 13, 1870, referred to the accounts as thus restated, then this law certainly ratified such act of the Comptroller and thereby impaired the obligation of the executed contract between the State and the railroads arising under the laws of 1861, 1863 and 1864.

If, however, this Court should conclude that the restatement of the account as of May 1, 1870, in effect, took place when the first payment was made by the railroads under the Act of August 13, 1870—viz., on November 1, 1870—and the Comptroller insisted that the amount of interest and

sinking fund due must be computed upon the basis of canceling and disregarding the payments made by the railroads in treasury warrants, then such cancellation by the State officers was done in pursuance of the law of August 13, 1870, and such construction of the duty imposed by the law placed thereon by the State officers and sustained by the State Court resulted in the impairment of the obligation of the contract between the State and the railroads.

The Legislature evidently intended to fix the basis for future payments by the act under discussion. It was passed August 13, 1870, and the first payment thereunder was required to be made on the first of November, following. The basis fixed was the aggregate amount of principal and interest as it stood May 1, 1870. If this aggregate had been held to be the balance, by allowing the payment in warrants, the State could not have prevailed, because it is conceded by the State's counsel that subsequent payments have been sufficient to extinguish a balance thus arrived at. If, however, the balance is to be reached by ignoring the payments in warrants, then the indebtedness sued for exists if the Act of August 13, 1870, which fixed that balance, is valid.

Suppose the act had actually specified the balance as being $657,324.35, due by the Houston and Texas Central Railway Company, and $103,840.01, due by the Washington County Railway Company, as claimed by the State in its petition (Record, p. 3), eliminating the payment in warrants. Suppose, further, that the State had then sued for such balance as named in the act. We apprehend that it then would not have been seriously denied that the act sought to impair the contract arising under the legislation of 1861–1863–1864, by virtue of which the payments were made, in that it repudiated the previous acts and everything done under them and sought to deprive the railway companies of the fruits of the contract. The result is precisely the same. The State sued for the balance fixed by that act. Judgment was rendered in its favor for that balance arrived at by excluding the payments in warrants. Therefore, according to the judgment the balance fixed by the act excluded said payments, for it is the balance under that act that the State sued for. It follows, therefore, inevitably, that, however its reasons were expressed the effect, and the result of the judgment was to give effect to the Act of

August 13, 1870, as impairing the contract arising under the Acts of 1861-1863-1864.

It must be remembered that this was a closed and executed transaction. Everything had been done by the railroads which was necessary to be performed by them in order to constitute a complete and perfect acceptance of the offer of the State of Texas. The warrants had been received by them at par instead of their actual market value in return for transportation, and the warrants had been surrendered to the State in pursuance of its offer and the State had received them, canceled them and given the railroads credit upon its books for the amount thereof.

The contract was therefore completed and executed, and the obligation of the contract upon the part of both parties was to see that the rights which had vested thereunder should not in any way be violated. The State's duty under such executed contract was not to deprive the railroads of the credit given to them upon the books of the State, when they surrendered the treasury warrants in pursuance of the laws of 1861, 1863 and 1864, and an implied contract that it would not do so arose immediately upon

the completion of the original transaction between them, and it would seem to require no argument to show that any subsequent law which did deprive the railroads of such credit, whether by its terms or by the construction put thereon by the executive and judicial department of the State, impaired the obligation of such contract.

It was long since decided in the case of Fletcher vs. Peck., 6 Cr., 87, that the provision of the Constitution forbidding a State from passing a law impairing the obligation of a contract applied to an executed contract as well as to an executory contract, and such is the law to-day.

The Fletcher suit was instituted upon the covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others in the year 1795 from the State of Georgia, the contract for which was made in the form of a bill passed by the Legislature of the State. The fourth covenant of the deed was that the title to the premises had been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent Legislature of the State of Georgia. The

third count in the declaration alleged that a subsequent Legislature of the State of Georgia passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void and asserting the title of the State to the lands it contained. It appeared that the lands in controversy vested absolutely in James Gunn and others, the original grantees, by conveyance of the Governor made in pursuance of an Act of Assembly to which the Legislature was fully competent. This Court held that the original contract of the State arising under its grant to James Gunn was a completed, executed contract, which under the Constitution could not be impaired by any subsequent act of the Legislature repealing such grant. The decision of the Court was delivered by Chief-Justice MARSHALL, who said at page 135:

> "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights, and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. * * *
>
> "The Constitution of the United States

declares that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

"Does the case now under consideration come within this prohibitory section of the Constitution.

"In considering this very interesting question, we immediately ask ourselves: What is a contract? Is a grant a contract?

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

"Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term 'contract,' without distinguishing between those which are executory and those which are executed, it must be con-

strued to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected. * * * *

"It is, then, the unanimous opinion of the Court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

In Von Hoffman vs. City of Quincy, 4 Wall., 535, Mr. Justice SWAYNE, in speaking of the case of Fletcher vs. Peck (*supra*), said at page 549:

"The case of Fletcher vs. Peck was the first one in this court in which this important provision [clause as to impairing the

> obligation of contracts] came under consideration. It was held that it applied to all contracts, executed and executory, 'whoever may be parties to them.'"

It would seem, therefore, that the law of August 13, 1870, as it has been construed by the executive officers of the State of Texas and by its Courts, has impaired the obligation of the contract between the State and the railroads in that it has taken from the railroads their vested rights in the credit given them by the State at the time of the surrender of the treasury warrants in question. To take away by an Act of the Legislature rights acquired under an executed contract is to impair by such law the obligation of the contract, or, in other words, to impair the obligation of the implied contract not to disturb rights vested under the completed contract, which implied contract arises as soon as the original contract is executed and closed.

FIFTH POINT.

If the entire transaction between the State of Texas and the railroads arising under the Laws of 1861, 1863 and 1864 is illegal and void because of the unconstitutionality of the consideration of the contract, then the maxim "In pari delicto potior est conditio defendentis" applies, and the Court will leave the parties as it finds them.

The position of the counsel for the State is that the treasury warrants paid by the railroads in pursuance of the offer contained in the Acts of 1861, 1863 and 1864 constituted an illegal consideration for the contract, and that, in consequence, there must be deemed to be no contract between the State and the railroads arising from the transactions between them.

In answer to this proposition, we insist that, if the treasury warrants are unconstitutional, and if, therefore, the consideration of the contract is illegal, then, it being an executed contract, the parties must stand by it and can get no relief.

I.

The doctrine, as we understand it, is that, if anything remains to be done by either party to an illegal transaction, the courts will not enforce such performance; but, if the illegal agreement has been entirely performed, the law will grant no relief to either party thereto. If, in the present case, the railroads had surrendered the treasury warrants to the State, and the officers of the State had declined to give them credit therefor upon the school-fund loan, the courts (conceding the warrants to have been illegal) would not have entertained any proceeding to compel the officers of the State to fulfill the contract arising under the Laws of 1861, 1863 and 1864, but would have left the situation as it was presented to them.

The question, however, which now arises, is whether a Court will allow a completed and executed contract to be set aside and considered null and void simply because it is discovered and claimed by one of the parties thereto, after the whole matter has been closed, that the consideration of the contract is illegal and void.

It will be well to examine again the facts in this case and see just what the situation here is.

The State of Texas made an offer to the railroads that if they would receive its treasury warrants at par for the transportation of freight and passengers over their lines it would receive such treasury warrants at par on account of the money due from the railroads to the State by reason of the school-fund loans. The railroads accepted the offer and did receive the State's treasury warrants at par in return for the transportation of freight and passengers over their lines. After the railroads had accumulated a number of such treasury warrants they surrendered them to the State in pursuance of the State's offer and the State accepted them, canceled them and gave the railroads credit for them upon the school-fund-loan account, and the transaction was completed and closed. Now, if there was anything illegal about it, the State was as much concerned in it as the railroads, if not more so. If the treasury warrants were issued in violation of law it was the State which issued them and not the railroads, and the innocent party in this matter is, surely, the railroads which had nothing to do with the issue of the warrants, and which had given therefor the use of their railroads for about one-tenth of the rates allowed by law, in

pursuance of the offer made by the State. It was the State which took the affirmative and made the offer. The railroads merely complied therewith.

If there was any degree of wrongdoing in the matter, the railroads certainly were the least at fault. But the law in such a case as this does not consider the question of degree, but simply declares that, if the transaction is in fact illegal, the parties are considered as being in *pari delicto* and are left as the law finds them. If the contract is executory, the Courts will not enforce it. If the contract is executed, the Courts will not relieve either of the parties thereto.

To permit the State to cancel the credit given by it to the railroads at the time of the surrender of the treasury warrants in question upon the ground that there was no contract between the railroads and the State, inasmuch as the consideration therefor was illegal, would be in effect to give relief to one of the parties to an illegal transaction at the expense of the other.

This is not, as we understand it, the policy of the law, and the established doctrine that in an executed illegal transaction "*potior est conditio defendentis*" applies as well to a litigation in-

stituted by a State as to one brought by an individual.

The rule was stated in Hill *et al.* vs. Freeman, 73 Ala., 200, 201, in the following language :

> "We understand it to be a first principle, not now to be assailed or even doubted, that where a contract based on a consideration contrary to law, immoral or opposed to public policy, has been fully and voluntarily executed, if the parties are in *pari delicto*, the courts will not interfere to disturb the acquired rights of either at the instance of the other. The result is the same as if the contract had originally been legal and valid, and neither can recover the consideration which he has thus voluntarily parted with."

Hutchins vs. Weldin, 114 Ind., 80, was an action of replevin. The defense was that the contract between the parties was executed, and as it was *contra bonos mores* the plaintiff could not recover. It was so held by the Court, and it was said at page 82 :

> " It cannot be denied that there was evidence before the jury which, if believed, authorized them to find that the plaintiff herein, by an executed contract of his own seeking and making, had parted with his title to and right to the possession of the mare in controversy. * * *

"We need not state what this contract was, as shown by the evidence, further than to say that it was fully executed by both the parties thereto, and plaintiff got all the consideration for the mare he bargained for. But the contract was *contra bonos mores* and void as against public policy. * * *

"Upon this point the Court, of its own motion, charged the jury in effect that, if they believed from the evidence that such contract was executed by the delivery of the mare to Whetstone after he had complied with the terms of plaintiff's proposal, the 'law in such a case will leave the parties just where it finds them. * * * If the contract has not been executed, it will not be enforced; if it has been executed, the law will not extend relief.' Where a contract, void as against sound morals or public policy, has been fully executed by both parties, and suit brought under, upon or against such contract '*potior est conditio defendentis.*'"

In Davis vs. Leonard, 69 Ind. 213, it was said at page 217:

"The agreement entered into between the plaintiff and defendant was a wager, nothing more and nothing less, upon the result of an election, and as such was void, as being in contravention of a penal statute, as well as against public policy. * * *

> " By his delivery of the wager to the defendant and his subsequent acquiescence in the mode of payment for it contingently provided by the defendant, the wager became an executed one on the part of the plaintiff. In such a case the law affords no relief. It leaves the parties where it finds them. In an effort to obtain relief under or upon a wagering contract '*potior est conditio defendentis.*' "

In Raguet vs. Roll, 7 Ohio, Pt. II., page 70, the plaintiff brought an action of ejectment, and upon the trial gave in evidence two mortgages executed by the defendant to him for $500 each. The defendant showed that the mortgages were executed by him to secure the payment of $1,000 in consideration of the plaintiff's agreeing not to prosecute the son of defendant for a theft. It was held that the plaintiff was entitled to recover upon the ground that the mortgages were in reality an actual payment of the debts, as well as an actual transfer of the land; and, when a conveyance has actually been executed on an unlawful consideration, the Court will not merely not annul it, they will not even. In the course of the opinion the Court said at page 71:

> " The distinction between an executed and executory contract, where the considera-

tion is unlawful, is a very plain one. In the former case the Court will not annul; in the latter they will not enforce, and this course, so totally opposite in the two cases, is intended to be subservient to the same end, the prevention of an immoral act."

The same principle was well stated in the case of Roll vs. Raguet, 4 Ohio, 400, 419, as follows:

> "Whenever an agreement appears to be illegal, immoral or against public policy, a court of justice leaves the parties as it finds them; if the agreement be executed, the Court will not rescind it; if executory, the Court will not aid in its execution."

The doctrine of the cases cited from the State Courts was recognized by this Court in Brown vs. Tarkington, 3 Wall., 377, 381, where it was said:

> "The illegality of the charter of the bank and of the organization under it, as well as the business of banking conducted through its means, were matters not in controversy upon the evidence. The only material question open was whether or not the plaintiff was *particeps criminis*. If he was, he was disabled, under the maxim, to recover. The law leaves the party thus situated where it finds him. If either has sustained loss by the bad faith of his associates, it is but a just punishment for the illegal adventure."

It would seem, therefore, that if the contention as to the illegality of this contract is successfully sustained by the counsel for the State of Texas, they are then met by the equally difficult proposition, to which we see no answer, that the State was in equal fault with the railroads, and that, therefore, the illegal contract being an executed one, the law will leave the parties thereto as it finds them.

II.

There is another aspect of this case which seems to us most important. Upon the execution of the contract between the State of Texas and the railroads there arose an implied contract that neither party should in any way deprive the other of the rights arising from such executed contract. This implied contract is the contract impaired by the Act of August 13, 1870, and our contention is that, even if it should be conceded that the original executed contract was illegal, such illegality in no way taints or affects the implied contract arising upon the completion and execution of the contract arising upon the Acts of 1861, 1863 and 1864. That is to say, there is nothing illegal about the implied contract not to

interfere with or deprive each other of the right which accrued and became vested upon the surrender of the treasury warrants, their cancellation and the credit given therefor by the State upon its books on account of the school-fund loan to the railroads. In other words, though a contract may be illegal and unenforceable, yet any collateral contract, or any contract arising indirectly from such illegal contract, is perfectly good and unaffected by the illegality of the original transaction.

In Planters' Bank vs. Union Bank, 16 Wall., 483, it appeared that at the outbreak of the Rebellion the Planters' Bank of Tennessee remitted to the Union Bank of Louisiana large sums of Confederate treasury notes, some drafts and other claims for collection and a few Confederate bonds for sale. It was understood that the drafts and claims and Confederate bonds were payable only in such Confederate currency. Thereafter and about the 1st of May, 1862, New Orleans was captured by the Government forces, and in August, 1863, General Banks issued an order requiring the banks in New Orleans to pay over without delay to the chief quartermaster of the army all money in their possession standing

upon their books to the credit of any corporation in hostility to the United States. Under this order the Union Bank paid the acting quartermaster the balance standing upon its books to the credit of the Planters' Bank. The payment was made in Confederate notes, and the quartermaster accepted them in discharge of the balance.

Thereafter and on the 15th of September, 1863, the Planters' Bank drew upon the Union Bank for $86,646, the sum in *Federal* money which it conceived to be due it. The Union Bank refused to pay, alleging the seizure by General Banks and payment over accordingly. Thereafter and on the 11th day of September, 1866, the Planters' Bank sued the Union Bank in the Court below to recover the balance claimed to be due it. The defendant upon the trial requested the Court to charge in effect that no valid obligation can arise from the sale of Confederate bonds and securities. The Court declined to so charge, and the plaintiff obtained judgment for the amount of its claim. The case was brought to this Court by writ of error and the judgment of the Court below was affirmed. Mr. Justice STRONG delivered the opinion of the Court, and at page 499 said:

"The only relevant question presented by the point was whether Confederate treasury notes had and received by the defendants for the use of the plaintiffs were a sufficient consideration for a promise, express or implied, to pay anything. After the decision in Thorington vs. Smith the point could not [but] have been affirmed. A promise to pay in Confederate notes, in consideration of the receipt of such notes and of drafts payable by them, cannot be considered a *nudum bactum* or an illegal contract.

"Nor should the Court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs, and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants, on any engagement made by them to sell. Such a contract would have been illegal. *But when the illegal transaction has been consummated; when no Court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different.* The Court is there not asked to enforce an illegal contract. The

plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the Court will not unravel the transaction to discover its origin."

In Brooks vs. Martin, 2 Wall., 70, it was held that:

"After a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms—the results of the contemplated operation completed—a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract" (Syllabus).

As was said by Mr. Justice MILLER at page 80:

"The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the Court in this case."

If, therefore, the transaction between the State of Texas and the railroads was illegal because of

the character of the treasury warrants surrendered by the railroads to the State, yet it would seem :

(1) That the State was in *pari delicto* and could not be relieved from the effect of the completed transaction between them.

(2) That, even if the original contract was illegal, yet such illegality did not affect the implied contract resulting therefrom.

The railroad companies gave the use of their lines for one-tenth of the rates allowed by law and then surrendered to the State treasury warrants which could have been otherwise disposed of for at least one-tenth of their face value. All this was done by the railroads in pursuance of the offer made to them by the State. To allow the State to escape from its agreement on the ground that what was delivered to it at its request was unconstitutional would certainly not be countenanced in the case of an individual, and we know of no different rule in the case where a State is one of the parties to a completed and executed illegal transaction. To use the words of Mr. Justice SWAYNE in Railroad Co. vs. Durant, 95 U. S., 576, 579 (substituting "State" for "trustee") :

"The position assumed by the *State* in this case is not unlike that of one who, having deprived the owner of the possession of his property, when called to account, civilly or criminally, should insist that the owner's title was fatally tainted with fraud, and that hence the offender had the right to 'take and carry away,' and keep and enjoy, the property himself with impunity.

"The conduct of the appellee, stripped of the verbiage with which it has been surrounded, and viewed in its nakedness, strongly offends the moral sense of the judicial mind."

III.

The State of Texas was not only in *pari delicto* in this case, but it deliberately, by an Act of the Legislature of August 15, 1870, ratified the Acts of 1861, 1863 and 1864, and ratified and confirmed the acts of its public officers done in pursuance of said last-named acts. The full text of the Act of August 15, 1870, will be found at page 22 *et seq.* of the appendix to this brief.

This Act of August 15, 1870, was vetoed by the then Governor of the State of Texas, but notwithstanding such veto was passed by the Legislature in the manner and by the number of votes required by the Constitution in order that

the same should become a law (Rec., p. 15), and by this act the State of Texas expressly recognized and acknowledged the validity of the payments made to it by the railroads in treasury warrants during the war in the following language, to wit:

> "And in making the settlement herein provided for, the Houston and Texas Central Railway Company shall be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865, by the said company and by the Washington County Railroad Company, upon the accounts on which said sums were respectively paid by said companies."

IV.

No good reason exists why the maxim "*In pari delicto potior est conditio defendentis*," as applied to all others, should not be applicable to the State. On the contrary, its application to the State in this case is enforced by much stronger reasons than support it as against individuals. The State alone issued the warrants in question. It issued them to meet obligations assumed by it. It invited the railroad companies to use the paper. It agreed, in consideration of the acceptance of the paper by the railroad companies at

par, to receive it as it did. It was the ruling power in the community, and all were bound to obey its laws. It accepted the paper—its own paper—without protest, and without objection.

It is wholly beside the question to say that it was not the *State* that engaged in the transaction. It is too well settled by the authorities to admit of serious dispute, that the Government of the State which engaged in the transaction was a lawful government, and the only representative of the State. No one has ever disputed the title of the officers of the State Government during the war, or denied that the Legislatures which sat during the war were lawful. There were no other persons claiming to be such officers, and no other body assuming to be the Legislature of the State of Texas. It is true that the people of Texas were engaged in rebellion against the National Government, but their identity as a State still remained. The Government of the United States never claimed to be the State Government of Texas. It asserted paramount authority, it is true, but it asserted authority as a National and not as a State Government. There were no contestants for the seats of the

legislators, and no other body assuming to exercise the functions of the Legislature; no persons claimed the offices held by the general officers of the State, or assumed to exercise their powers or privileges. The officers of the State, and the Legislature of the State, during the war, represented as nearly the unanimous sentiment of the people of the State as it has ever been represented before or since. Under such circumstances, it seems little short of absurd to say that the Legislature which passed the laws authorizing the payments in question, and the officers of the State executing the transaction, did not represent the State of Texas.

We readily concede that the State is not bound by the act of an officer clearly in excess of power conferred upon him by law, and that an act of the Legislature contrary to the Constitution is not binding for any purpose, and cannot, of course, justify official action based upon it and unauthorized without it. But that is another question, and is wholly apart from this case. No such question arises here. No one can deny, in view of the authorities, that the Legislature by which the acts were passed was a lawful Legislature of this State and the only body au-

thorized or assuming to enact laws for the State. No one can deny that it was authorized, within the limits of legislative power, to speak for the State, or that it was the only body authorized to legislate for the State. No one can deny, with any reason, that the Comptroller who carried out the mandates of the Legislature was the lawful Comptroller of the State, and the only person authorized to exercise, or assuming to exercise, the functions and duties of that office. Upon what reason, then, can it be held that the Legislature, in passing the acts in question, and the Comptroller in executing them, were not acting for and representing the State of Texas, and its only government in fact as well as in law? If the members of the Legislature did not represent the State, who did represent it? Whatever view may be taken of the validity of the transaction upon other grounds, we do insist that it cannot be denied upon any such pretext as that the Legislature authorizing it, and the Comptroller conducting it, were not representing the State.

V.

In this connection it is proper to consider the question of the effect which the war between the

States had upon the powers of the individual States seceding, and the effect of legislation and official action during that period. The question has most frequently arisen in cases where it was charged that certain acts were in aid of the Rebellion.

Did the seceding States pass out of existence during the war? By "State" we mean, of course, not merely a certain territory with fixed geographical boundaries, but also the organized political community which inhabited that territory, and the government thereof. Did the State of Texas cease to exist during the war? Had it for four years no government, no Legislature, capable of passing any valid laws, no executive or other State officials capable of representing or acting for the State, no judiciary qualified to render valid judgments?

Frequent adjudications of this Court have settled these questions, and there is now little room for doubt or controversy as to the legal status of the seceding States, and of the quasi-revolutionary governments which existed in them during the war. It is now familiar and settled law that the union between the States forming the United States was not only an inde-

structible union, but it was a union of indestructible States; that, although the ordinance of secession passed by the individual States was treasonable, null and void, it did not destroy the existence or autonomy of the States which passed it; that, while the governments of those States in rebellion were in some degree revolutionary and unlawful, still they were the only governments, they were the actual *de facto* governments, and the acts of the various departments thereof are valid and binding, *unless* shown to be in violation of some provision of the Constitution of the United States or of the State, at the date of secession, or unless shown to be in aid of the Rebellion (*Johnson vs. Atlantic, etc., Co.*, 156 U. S. 618; *Huntington vs. Texas*, 16 Wall., 402). We call attention to the case of *Davis vs. Gray*, 16 Wall., p. 225, where acts of the Legislature of Texas, passed during the war and giving new life and force to land grants in aid of railroads, were declared to be valid and binding laws; and to the same ruling in *Railroad Co. vs. Kuechler*, 36 Texas, 382; and, also, to *Huntington vs. Texas*, *supra*, where legislation during the war, authorizing the disposal of certain United States bonds, was held to be valid and binding

because *plaintiff* failed to *prove* that the particular transaction thereunder was in aid of the war.

The legal character and status of the government of the Confederate States, and the legal character and status during the war of the governments of the individual States who were members of the Confederacy, were essentially different. The government of the Confederate States had no existence prior to the war; it owed its existence to the ordinances of secession and to the acts of a convention, all of which have been declared to be absolute nullities. It had no other functions to perform than those of hostility to the United States. Being the supposed product of null acts, and existing solely for the purpose of destroying the Union, this Court has always denied its power to enact a binding law, and never accorded it the character of even a *de facto* government; and, when it fell, there perished with it all its laws and ordinances. But with the individual States it was wholly different. They existed prior to the secession; the ordinance of secession, null and void as it was, caused no break in the political continuity of their governments, and no change in their internal structure. They had powers and duties

independent and outside of their relations to the Federal Government, which were not affected by the temporary suspension of those relations during the war. These powers and duties, which were unimpaired by the war, extended to all the legitimate functions of purely State governments, and embraced the control of domestic concerns, matters to which the power of the Central Government did not extend. Hence, the existing State governments during the war were clothed, *ex necessitate rei*, if for no other reason, with full power of legislation and administration *quoad* the purely domestic concerns of the State, and this included the enactment of such financial measures as were within the domain of ordinary legislation (*Williams vs. Bruffy*, 96 U. S., 176, 192; *Horn vs. Lockhart*, 17 Wall., 570; and authorities already cited).

We briefly repeat that if the transaction between the State of Texas and the railroads was illegal:

(1) The State was in *pari delicto* and could not be relieved from the effect thereof.

(2) The illegality of the original transaction did not affect the implied contract resulting therefrom.

(3) The State of Texas expressly ratified by the Act of August 15, 1870, the credit given by it to the railroads for the treasury warrants surrendered by them during the war.

SIXTH POINT.

If the construction put upon the Act of August 13, 1870, by the executive and judicial departments of the State of Texas is the proper construction of such act, and if such construction does not make the act one which impairs the obligation of the contract between the State of Texas and the railroads arising under the Acts of 1861, 1863 and 1864, then such act is void and unconstitutional upon the ground that it deprived the railroads of their property without due process of law.

It is conceded that the State of Texas did give the railroads credit upon its books for the amount of the treasury warrants. The right to this credit was the result and outcome of the completed and executed contract between the railroads and the State and was a right vested in the railroads.

It is now settled beyond controversy that a railroad corporation is a person within the meaning of the Fourteenth Amendment of the Constitution, declaring that no State shall deprive any person of property without due process of law.

Smyth vs. Ames, 169 U. S., 466, 526.
Covington, &c., Turnpike Co. vs. Sandford, 164 U. S., 578.

It is, of course, unnecessary to argue that the credit given the railroads upon the books of the State was property, and that to arbitrarily cancel and discharge such credit without giving the railroads an opportunity to be heard upon the question was a depriving of the railroads of their property without due process of law, and contrary to the Fourteenth Amendment to the Constitution, which enacts that no State shall " deprive any person of life, liberty or property without due process of law."

In Osborn vs. Nicholson, 13 Wall., 654, the plaintiff brought suit upon a note dated March 26, 1861. The defendants pleaded that the note was given in consideration of the sale of a certain negro slave for life, and that the said negro was liberated by the United States Government

on the 1st day of January, 1862. The plaintiff demurred. The Court overruled the demurrer, and, the plaintiff electing to stand by it, gave judgment for the defendants. The case was then brought to this Court by writ of error, and it was decided that the demurrer was good. Among other grounds, it was expressly held that the plaintiff, by his contract with the defendants for the sale of this slave, which was a valid contract at the time it was entered into, had acquired a vested right to the money due him under his contract, and that such vested right could not be taken from him by the Thirteenth Amendment of the Constitution relating to slavery, and that to so hold would in effect be depriving the plaintiff of his property without due process of law. The Court, speaking through Mr. Justice SWAYNE, said, at page 662 :

> " But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that, when the Thirteenth Amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist

afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to 'the general principles of law and reason,' and to one of the most vital ends of government. The doctrines of the repeal of statutes and the destruction of vested rights by implication are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. *The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be 'without due process of law.'* This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation."

In Chicago, &c., Railway Co. vs. Minnesota, 134 U. S., 418, an act of the Legislature of Min-

nesota establishing a railroad and warehouse commission was interpreted by the Supreme Court of that State as providing that the rates charged for the transportation of property recommended and published by the commission should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates and no opportunity given to the railroad companies to show what rates would be reasonable or unreasonable. It was held by this Court that, if such was the proper construction of the act, then the act was in violation of the Constitution in that it deprived the railroads of their property without due process of law. At page 457 of his opinion Mr. Justice BLATCHFORD, speaking for the Court, said :

> " Under Section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to ' find ' that any part thereof is in any respect unequal or

unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission 'shall declare to be equal and reasonable,' and to that end it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission; in fact, nothing which has the semblance of due process of law. * * *

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property; and thus, in substance and effect, of the property itself without due process of law and in violation of the Constitution of the United States."

Mr. Justice MILLER, who wrote a separate

opinion concurring in the judgment of the Court, said, at page 461 :

> " But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a Court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void."

The Statute of August 13, 1870, as construed by the highest Court of Texas, also deprives the railroads of their property without due process of law in this: that it takes from them the credit given them by the State in its school-fund-loan account without giving them any due or just compensation therefor.

" The construction so given to the statute by the highest Court of the State must be accepted by this Court in judging whether the statute

conforms to the Constitution of the United States" (Missouri Pacific Railway Company vs. Nebraska, 164 U. S., 403, 414), and when the Court of Texas found in this case that in pursuance of the Act of August 13, 1870, "the payment in treasury warrants were charged off the account, and the account of the State with the defendant railway company was restated May 1, 1870, so as to ignore said payments in treasury warrants" (Rec., p. 71), the Act of August 13, 1870, was construed by such Court as taking away from the railroads these credits and giving them nothing in return. That is to say, the railroads were deprived of their vested contract rights without any compensation therefor, and it is well settled by this Court that any law which deprives a person of his property without compensation is in violation of the clause of the Fourteenth Amendment which declares that no State shall deprive a person of his property without due process of law.

It has been decided many times by this Court that a State cannot require railroad companies to carry passengers and freight without reward or for less than a reasonable compensation or rate, and that any legislation attempting to reach such

a result would be obnoxious to the objection that it deprived the companies of their property without due process of law, in that it would amount to taking their property without due compensation.

Railroad Commission Cases, 116 U. S., 307, 331.
Dow vs. Beidelman, 125 U. S., 680, 689.
Georgia Rd. & Banking Co. vs. Smith, 128 U. S., 174, 179.
Chicago, Milwaukee & St. Paul Railway vs. Minnesota, 134 U. S., 418, 458.
Chicago & Grand Trunk Rway. vs. Wellman, 143 U. S., 339, 344.
Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362, 399.
St. Louis & San Francisco Railway vs. Gill, 156 U. S., 649, 657.
Covington & Lexington Turnpike Road Co. vs. Sandford, 164 U. S., 578, 584, 594–5, 597.

In Chicago, Burlington, &c., Railroad vs. Chicago, 166 U. S., 226, the question was expressly decided, and Mr. Justice HARLAN, speaking for the Court, said at page 236:

> " Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, there-

fore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. * * *

"In our opinion, a judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest Court of the State is a denial by that State of a right secured to the owner by that instrument."

In Smyth vs. Ames, 169 U. S., 466, it was held that the effect of an Act of the Nebraska Legislature, which prescribed rates for the transportation of freight entirely within the State boundaries, was to deprive the railroads of their property without due process of law, in that such companies were required to carry freight without exacting charges which yielded a reasonable compensation for such service, and the act was condemned as unconstitutional. It was declared by the Court at page 526 as settled law that:

"While rates for the transportation of persons and property within the limits of a

> State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority that the matter may not become the subject of judicial inquiry."

We do not know that the character of the property of a railroad company which is taken by a State without compensation in any way affects the application of the constitutional provision, and, so far as we can understand, there is no difference between taking the transportation facilities of a railroad without compensation and taking any other part of its property without compensation, as, for instance, in this case the credit given to the railroads, and standing upon the books of the State, which was entered in the account between the railroads and the State at the time of the surrender to the latter of the treasury warrants in question in this suit.

Under this Law of August 13, 1870, without notice and without compensation, the credit which had been theirs since 1864 is suddenly taken from the railroads and transferred to the other

side of the account. For years the State had been the debtor of the railroads for this large amount credited to the railroads, and in a moment, without notice and without compensation, the situation of the parties is suddenly reversed, and the State becomes a creditor of the railroads for the amounts as to which it had previously admitted payment. In other words, the credit on the books of the State, which was the property of the railroads, was taken from them and nothing given to them in compensation therefor.

It would, therefore, seem that the Act of August 13, 1870, violates in two respects the constitutional provision declaring that a State shall not deprive a person of his property without due process of law.

FIRST. It has taken away from the railroads the credit given them upon the books of the State without an opportunity to be heard.

SECOND. When the credit in favor of the railroads was taken by the State, transferred to the other side of the account and changed into a debit, no compensation therefor was given to the railroads.

Even if there were no Fourteenth Amendment to the Federal Constitution it is not at all clear

that a State which has created by legislation vested rights in its citizens can by subsequent legislation deprive them of such rights. This Court at least has never seemed of the opinion that such power resided in the Legislature of a State.

In Terrett vs. Taylor, 9 Cr., 43, 50, Mr. Justice STORY said:

> "If the Legislature possessed the authority to make such a grant and confirmation, it is very clear, to our minds, that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito.* Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

In Wilkinson vs. Leland, 2 Pet., 627, 657, Mr. Justice STORY delivered the opinion of the Court, as follows:

> "In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate

in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away *without trial, without notice and without offense.* Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be left sacred. At least, no Court of Justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention."

In Calder vs. Bull, 3 Dallas, 386, 394, it was said:

> "It is not to be presumed that the Federal or State Legislatures will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community *and on making full satisfaction.* The restraint against making any *ex post facto* laws was not considered by the framers of the Constitution as extending to prohibit the depriving a citizen even of a vested right to property: or the provision '*that private property should not be taken for public use without just compensation*' was unnecessary."

In the case of Steamship Company vs. Joliffe, 2 Wall., 450–457, it was said by Mr. Justice FIELD:

> "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the parties asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

The doctrine of the cases cited would seem to be that, independently of the provisions of the Fourteenth Amendment of the United States Constitution, vested rights granted by a Legislature cannot be revoked by a subsequent Legislature.

RECAPITULATION.

We briefly repeat the main propositions, exclusive of the removal question, presented to the Court in this case :

FIRST. It is for this Court to determine whether there was a contract between the State of Texas and the railroads.

SECOND. The Laws of 1861, 1863 and 1864, and the proof contained in the record of what was done by the railroads thereunder, and the acts of the State officers in canceling the treasury warrants surrendered by the railroads, establish a *prima facie* case of an executed contract between the State and the railroads, and there is no evidence in the record which in any way invalidates such contract.

THIRD. The obligation of the executed contract between the State and the railroads was impaired by the Act of August 13, 1870, inasmuch as the construction placed thereon by the executive officers of the State and sustained by the Court below took from the railroads the rights which had vested in the railroads under the contract—viz., the credit given to the railroads upon the books of the State at the time the treasury warrants were surrendered.

FOURTH. Even if the contract between the State of Texas and the railroads, arising under the laws of 1861, 1863 and 1864, is illegal, it is a completed transaction, and the Courts will give neither party relief therefrom under the maxim "*In pari delicto potior est conditio defendentis.*"

FIFTH. The Act of August 13, 1870, violates the provisions of the Fourteenth Amendment to the United States Constitution in that the construction placed thereon by the officers of the State of Texas and by the Court below deprives the railroads of their property—viz., the credit given them upon the books of the State, without due process of law.

SEVENTH POINT.

The judgment of the Court below should be reversed.

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Of Counsel for Plaintiffs in Error.

Appendix to Brief

CONTAINING

All the Acts of the Texas Legislature Referred To in the Brief and Not There Cited at Length.

CHAPTER II.

An Act accepting the propositions made by the United States to the State of Texas, in an Act of the Congress of the United States, approved the 9th day of September, A. D. 1850, entitled "An Act proposing to the State of Texas the establishment of her northern and western boundaries, the relinquishment by the said State of all territory claimed by her, exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico."

WHEREAS, said propositions are contained in the first section of said act, in the following words, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the General Assembly, shall be binding and obligatory upon the United States and upon the State of Texas: Provided, the said agreement by the said General Assembly shall be given on or before the 1st day of December, eighteen hundred and fifty.

FIRST. The State of Texas will agree that her boundaries on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico.

SECOND. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

THIRD. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, custom-houses, custom-house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

FOURTH. The United States, in consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars in stock bearing five per cent. interest and redeemable at the end of fourteen years, the interest payable half-yearly at the Treasury of the United States.

FIFTH. Immediately after the President of the United States shall have been furnished with an authentic copy of the Act of the General Assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article in this agreement: *Provided, also*, that no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the Treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury and approved by the President of the United States; *provided*, that nothing herein contained shall be construed to impair or qualify anything contained in the third article of the second section of the joint resolution for annexing Texas to the United States, approved March first, eighteen hundred and forty-five, either as regards the number of States that may hereafter be formed out of the State of Texas, or otherwise."

THEREFORE, 1st, Be it enacted by the Legislature of the State of Texas, That the State of Texas hereby agrees to and accepts said propositions; and it is hereby declared

that the said State shall be bound by the terms thereof, according to their true import and meaning.

2d. That the Governor of the State be, and he is hereby, requested to cause a copy of this act, authenticated under the seal of the State, to be furnished to the President of the United States by mail as early as practicable; and also a copy thereof, certified in like manner, to be transmitted to each of the Senators and Representatives of Texas in Congress, and that this act take effect from and after its passage.

Approved November 25, 1850 (Vol. III., Part IV., p. 4, Laws of Texas, 1850).

CHAPTER XVIII.

An Act to establish a system of schools.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the sum of two millions of dollars of the five per cent. bonds of the United States, now remaining in the Treasury of the State, be set apart as a school fund, for the support and maintenance of public schools, which shall be called the Special School Fund, and the interest arising therefrom shall be apportioned and distributed for the support of schools as herein provided.

SEC. 2. That the Chief-Justice and County Commissioners shall constitute a Board of School Commissioners for each county, whose duty it shall be, during the year eighteen hundred and fifty-four, to form their respective counties into school districts of convenient size, and number the same, so that each district in a county shall be known by its appropriate number. Provided, however, that in forming said districts, the convenience of neighborhoods shall be regarded as much as possible and each school district shall contain a sufficient number of children for the maintenance of a school. They shall also, at the same time, order an election by the qualified voters of each school district, for three Trustees for each district, giving ten days' notice of said election by posting up advertisements of the same at one public place, at least, in each district, stating fully the time and places of holding and the object of said election.

SEC. 3. It shall be the duty of the Chief-Justice to appoint a suitable person in each district to preside at the election in his district, who shall make his returns within ten days to the Chief-Justice of the county, and the said elections shall in all other respects be governed by the laws regulating elections.

SEC. 4. The District Trustees so elected shall select from their number a chairman, who shall, whenever it may be deemed necessary, call a meeting of the Trustees,

and preside at their deliberations, and perform such other duties as may hereafter be assigned him.

SEC. 5. That it shall be the duty of the assessor and collector of each county in the State, during the year eighteen hundred and fifty-four, and every year thereafter, to make out a list of all the free white population in his county between the ages of six and sixteen years, particularly designating the number of persons between such ages in each school district, and transmit the same, under his hand and official signature, to the County Clerk of the county, and a certified copy thereof to the Treasurer of the State, on or before the first day of July in each and every year.

SEC. 6. That it shall be the duty of the Clerk of the County Court to file and preserve in his office the election returns and the list aforesaid furnished by the assessor and collector. It shall be the duty of the Treasurer of the State to ascertain, from the abstracts transmitted to him by the assessor and collector, the aggregate population between the ages of six and sixteen years, and so much of the fund appropriated by this act as may be in the treasury shall be apportioned among the different counties in the State according to the number of the population of scholastic age in each county, subject to the order of the County Courts, and payable to the respective County Treasurers, upon the order of such County Court, under the hand of the Chief-Justice and the seal of the Court, or such amount may be placed to the credit of the assessor and collector of taxes of such county, upon his payment into the county treasury of his county the amount so apportioned to such county, and filing the receipt of the County Treasurer, acknowledged by said Treasurer before the Clerk of the County Court, and by the said Clerk duly certified, under his hand and the seal of his Court, with the Treasurer of the State.

SEC. 7. That it shall be the duty of the District Trustees to fix the time and place for holding an election in their respective districts (for the location or selection of school houses within their respective districts), and to

appoint a presiding officer. That the chairman of the Board of Trustees shall cause written notices of said election to be posted up for at least five days next preceding the election, in three public places in each school district. That the returns of said election shall be made within five days to the chairman of the said board, who shall examine the same in presence of his co-Trustees; and a majority of the votes polled in a district shall be necessary to the permanent location of a school house; and no change of the location of a school house thus located shall be made, except by a majority of two-thirds of those voting in such election, taken after due notice as above provided.

SEC. 8. That no money shall be drawn from the county treasury for school purposes in any school district until the people of such district shall have provided a good and substantial school house, with the necessary seats and other fixtures, and that the money appropriated by this act shall be applied only towards the payment of teachers for each school.

SEC. 9. That it shall be the duty of the School Trustees for each district, as early as practicable after their election, by giving due notice, to call a meeting of all the patrons of the school in the district, and a majority of those present shall indicate to the Trustees the length of time during the year they desire a school, the kind of teacher they want, and the amount of salary they are willing to pay. It shall be the duty of said Trustees to observe as far as possible such instructions, to employ teachers of suitable moral character and qualifications, to visit from time to time the district school or schools under their charge, to expel a pupil for misconduct, to examine all complaints between teacher and pupil of a serious character, to discharge a teacher for incapacity or improper conduct, and generally to exercise supervision over the affairs of the school within their district.

SEC. 10. That the teacher of each school shall be required to keep a roll or day book, and at the close of his term of service to furnish said School Trustees with a

tabular statement of the names of all the patrons and pupils of the school, the number of pupils sent by each patron, and the number of days' attendance by each pupil, which statement shall be supported by his affidavit, made before some officer authorized to administer oaths, that the same is true and correct.

SEC. 11. That it shall be the duty of said Trustees, upon receiving the shares of the school fund to which their school district is entitled, to apply the same towards the payment of the teachers' salary, and the remainder of said salary, if any, to apportion equally among the patrons of the school according to the number of pupils and the time sent by each to the school; and, if any such patron should neglect or refuse to pay his share of the salary apportioned as aforesaid, said Trustee may institute suit against him or her for the amount of money due, and the tabular statement furnished them, under oath, by the teacher, and mentioned in the preceding section of this act, shall be *prima facie* evidence of such indebtedness.

SEC. 12. If any patron or patrons of the school are unable to pay their share of the salary apportioned as aforesaid and the said Trustees be satisfied of the fact, it shall be the duty of said Trustees to make out a list of all such patrons in the district, together with the amount of money due from each for tuition, and forward the same under their own proper signatures to the Chief-Justice of the county.

SEC. 13. That the Chief-Justices of each county shall annually furnish the Treasurer of the State with a statement under his hand and seal of the county, of the amount of money due for tuition from all such patrons as are exempt under the preceding section of this act in the county, according to the list returned by the School Trustees. And the Treasurer of the State is hereby authorized and required to pay said amounts of money due from the patrons so exempt, out of the school fund derivable from taxation and created by the Constitution of the State, and he shall distribute the same in manner and

form as provided in the sixth section of this act.

SEC. 14. That the County Treasurer of each county shall give bond with two or more securities, payable to the county in twice the amount of the school fund to which his county shall be entitled, so soon as the Chief-Justice shall be notified by the Treasurer of the State of the amount to which his county is entitled, which bond shall be conditioned that he will well and faithfully keep an account for the money to him committed as a school fund for his county, and pay out the same only upon the order of the Chief-Justice of the county, under his hand and the seal of the County Court. He shall also enter into a bound book to be kept by him for that purpose, all moneys received, all moneys paid out, and to whom and when paid, and register and number all orders by him paid or accepted to be paid, which book, together with such orders, shall be by him exhibited at his annual settlement with the County Court. That after the year eighteen hundred and fifty-four his said bond shall be renewed between the first and tenth of September of each year, that all suits upon such bonds shall be in the name of the county and in other respects they shall be governed by the laws relating to the bonds of County Treasurers.

SEC. 15. That the Trustees of each school district shall be elected annually after the year eighteen hundred and fifty-four on the first Monday in September, in the manner herein provided; that they shall be a body corporate and politic, by the corporate name of the Trustees of Common School, District No. —— (filling the blank with the number of the district), and for the purposes for which they are created may sue and be sued, hold and dispose of property and do such acts and things as are incidental and necessary to the performance of their duties.

SEC. 16. That the Treasurer of the State shall be *ex-officio* Superintendent of Common Schools in this State, and it shall be his duty, immediately after the first day of September in each and every year, to record the abstracts of children of lawful age in the different counties and apportion the moneys as herein contemplated,

distributing to the several counties the amount to which each is entitled, according to its scholastic population, ascertained in the manner herein prescribed and also the amount due for the tuition of children exempt from tuition fees; and it shall further be the duty of the Treasurer of this State to provide the necessary record books, to be by him kept exclusively for recording abstracts as herein contemplated, and keeping a full and perfect account of all investments and moneys belonging or in anywise appertaining to the common-school fund of this State, and all apportionments and distribution of money by him made for common-school purposes; and he shall report to the Governor annually on or before the first day of October the condition of the common-school fund, and also make to each regular session of the Legislature such suggestions in regard to the common-school system as may be deemed advisable; that the fiscal scholastic year shall commence on the first day of September and end on the first day of August in each and every year from and after the first day of September next.

SEC. 17. That it shall be the duty of the Chairman of the Board of Trustees for each school district to present, at least once a year, his application to the Chief-Justice of his county for such amounts of said fund as his district may be entitled to receive, according to the number of children between the ages heretofore prescribed within his district, and also present his application to the Chief-Justice annually for the amount of money due his district for the tuition of children exempt from tuition fees; and the said Chief-Justice having duly informed himself that the same is correct, shall draw upon the County Treasurer an order, under his hand and seal of the County Court, for the amount or amounts so due and demanded.

SEC. 18. That nothing in this act shall prevent the Trustees of any school district, after being instructed by a majority of the patrons of schools in such district, from employing the teacher of a primary department in any

college or academy, and converting such primary department into a common school for such district; and that this act take effect from and after its passage.

Approved January 31, 1854 (Gen. Laws of Texas, 5th Legislature, p. 17).

CHAPTER CIII.

An Act to provide for the investment of the Special School Fund in the bonds of railroad companies incorporated by the State.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the Governor, Comptroller and Attorney-General shall, *ex officio*, constitute a Board of School Commissioners, whose duty it shall be to draw from the treasury the Special School Fund created by the Act of January 31st, 1854, entitled "An Act to establish a system of schools," and such other amount as may hereafter be added to said fund, and invest the same as provided in this act. And said board shall annually report to the Governor its acts and proceedings relative to the said school fund, which shall be laid before the Legislature at each and every session thereof.

SEC. 2. That the five per cent. indemnity bonds belonging to said Special School Fund may and shall be loaned to legally incorporated railroad companies in this State at their current value, including premium, provided said value shall not be less than par, otherwise at par, for the term of ten years from the date of said loans at an interest of six per cent. per annum, payable annually upon the terms and conditions specified in this act, provided that one-half of said fund shall be loaned to companies whose works lie east of the Trinity River, and the residue to companies whose works lie west of said river.

SEC. 3. Said Board of Commissioners is hereby authorized to invest said funds by loaning to any such company which has been chartered for the purpose of building a railroad in this State the sum of six thousand dollars per mile for each and every mile of railroad constructed as hereinafter provided. Said loans to be secured by the bonds of such company for said principal and interest, made and executed to the State of Texas in the corporate name of such company, signed by the president, and countersigned by the secretary or treasurer under

the seal of such company, which bond shall constitute a lien upon the road and charter rights of such company, including the roadbed, right of way, grading, bridges, iron, rails, equipments and masonry, and upon all the stock subscribed for in said companies, all the depots and depot stations and all the property owned by such company as necessary for its business. And the State of Texas upon the execution of said bonds, and by virtue of the same, shall be invested with said lien or mortgage for the payment of said bonds and the interest thereon as the same becomes due, without the necessity of any deed, special contract or act of registration.

SEC. 4. Said Board of Commissioners shall loan said sum of six thousand dollars for every mile of road completed to any such company as shall have completed in a good and substantial manner, and furnished ready for actual use, a continuous section of twenty-five miles of the road of said company, and graded an additional consecutive section of twenty-five miles, ready for the crossties and other superstructures; and the same amount per mile for every additional consecutive section of ten miles which shall be so completed and graded, ready for the ties and other superstructure. And the same amount per mile for every section of ten miles which shall be so completed and furnished ready for use, upon any railroad which shall be a continuation of or connection with any other railroad running from any adjoining State or Territory in the State of Texas; provided such road shall, together with such continuation or connection, be completed at least twenty-five miles in length; and provided that, before said loan is drawn upon any completed section of ten miles, an additional consecutive section of ten miles shall be graded ready for the ties and other superstructure.

SEC. 5. That upon the application of any such railroad company to said Board of Commissioners for said loan, and its representations that Section fourth of this act has been complied with, said Board of Commissioners shall appoint some competent engineer, who shall, at the

expense of the company, examine the road of said company, and make a full report upon the condition of the same under oath, and shall report all matters pertaining to the business of said company which he may deem useful to said Commissioners in ascertaining the true condition of said road and company. And upon being fully satisfied that any section or sections of said road have been constructed and completed, as provided in the fourth section of this act, and that said section or sections are not subject to any lien whatever, other than such as may be created by this act in favor of the State, said Board shall draw a warrant on the Treasury of the State, in the name of said company, against said Special School Fund, for such amount of said bonds as it may be entitled to under the provisions of this act, which warrant shall state on account of what work it is drawn, shall be signed by said Board of Commissioners, and countersigned by the Governor, and delivered to the President or the duly authorized agent of said company.

SEC. 6. That, upon the presentation of such warrant or warrants to the Treasury of the State, the amount of said indemnity bonds called for in the same shall be delivered and transferred according to law to the President or authorized agent of said company, his receipt taken therefor, and the same charged to the Special School Fund.

SEC. 7. That, before said Board shall deliver to said Company said warrant or warrants upon the treasury, it shall require said company to execute and deliver into the treasury the bonds of said company for said loan or loans in sums of not more than one hundred and fifty thousand dollars and not less than fifty thousand dollars each, payable to the State of Texas ten years after date, together with coupon bonds for the six per cent. interest thereon, payable annually, as above stated, which bonds shall be executed in the mode prescribed in the third section of this act, and shall be made payable at the office of the Treasurer of the State, and which shall be a lien in favor of the State, as specified in the third section of this act, and shall have a priority

over all other claims against said company. That, in addition to the annual interest of six per cent., every company accepting any loan under the provisions of this act shall pay annually, at the expiration of each year from the date of the loan, the further sum of two per cent. upon the amount of the loan into the treasury of the State for the purpose of establishing a sinking fund to be applied towards the payment of the loan at its maturity, and the amount so paid for the purpose of such sinking fund, with their accumulations, shall be credited to such railroad.

SEC. 8. And after the execution of said bonds upon said first section, or any subsequent constructed section, it shall not be lawful for said company to give, create or convey to any person or persons, or body corporate whatever, any lien, incumbrance or mortgage of any kind which shall have priority over or come in conflict with the lien herein secured, and any such lien, incumbrance or mortgage shall be null and void as against said lien or mortgage in favor of the State.

SEC. 9. That it shall be the duty of any such company, as the interest becomes due upon said bonds executed as aforesaid, to deposit the same in the treasury of the State, which amount shall be credited to the Special School Fund, and shall be subject to the immediate appropriation for school purposes as provided by law. And all railroad companies shall pay said interest so due by them annually on the first day of March out of the first receipts arising from said road, independent of any expenses or other liabilities of said roads, and the coupon bonds of such companies so satisfied shall be canceled and delivered up.

SEC. 10. Whenever any of the bonds of said company for the principal loaned thereon shall become due, said company shall deposit said sums so due in the treasury of the State, and said bonds when so paid shall be canceled and delivered up, and said principal sums so returned into the treasury shall be credited to the Special School Fund and subject to reinvestment by said board, as provided in this act.

SEC. 11. That, if any such company shall fail or refuse to pay said principal or interest bonds from time to time as the same shall become due, the road of said company, together with all the rights and property of said company specified in Section third of this act, shall be sold or caused to be sold by the Governor of the State for the satisfaction of said bonds so due, as well as the bonds of said company which may have been given under this act to the State, and the whole of said bonds shall be deemed due if said sale takes place, and the proceeds of such sales shall be deposited in the treasury and credited to the Special School Fund.

SEC. 12. That, upon the failure of any such company to pay said principal or interest bonds, as required in this act, it shall be the duty of the Governor, after the expiration of thirty days, to cause notice of the sale of such road, to be advertised in some newspaper published at the seat of government for the term of three months. And after due notice has been given shall cause the entire road, together with all the rights and property of said company specified in the third section of this act, to be sold at public auction to the highest bidder for cash, at the door of the capitol of the State and at the time specified in said advertisement; provided that, if the principal or interest bonds which may have become due before the giving of said notice, and all cost attending said proceedings, shall be paid before the day of sale, then said proceedings for sale shall be stopped.

SEC. 13. In the event of any sale of any railroad under the provisions of this act, it shall be the duty of the Governor, either in person or by agent, to attend such sale and protect the interests of the Special School Fund, and shall, if necessary to protect said interest, buy in said road with all the rights and property belonging to said company, in the name of the Board of School Commissioners; provided, he shall not bid more than the amount of the bonds of said company with the interest due thereon, and the cost and expenses attending said sales. And, in the event of any such purchase in the

name of the Board of School Commissioners, the Governor shall appoint a Receiver, who shall be required to enter into such bonds as may be required by the Governor, and whose duty it shall be to take immediate possession of and to control and manage said road, under direction of the Governor, until otherwise disposed of by law, the said Board of School Commissioners shall retain in the treasury of the State, charged to the credit of the school fund, five per cent. of the United States bonds, of all sums loaned as provided in this act, as a sinking fund, to be used for the "*pro rata*" appropriation annually due to the several counties for school purposes, in the event of the interest due to the school fund after the sale of any railroad shall not be paid by said road.

SEC. 14. The State of Texas expressly reserves the right to enact hereafter all such laws as may be deemed necessary to protect the interest of the Special School Fund in securing the payment of said bonds and in enforcing the lien reserved thereon.

SEC. 15. That the provisions of this act shall not extend to any railroad company which may be entitled to receive from the State a larger grant of land than sixteen sections of six hundred and forty acres to the mile for the construction of such road, nor to any road for more than a single trunk with the necessary turn-outs, nor to any branch road, nor to any road which shall not be commenced and prosecuted as required by the provisions of its charter. Provided, that no company shall be entitled to a loan under this act for any section of road between the Cities of Galveston and Houston, or Galveston and the crossing of Buffalo Bayou near the City of Houston.

SEC. 16. That no railroad which is less than fifty miles in length, according to the terms of its charter, shall be entitled to the benefits of this act, except on the following terms: The Brownsville and Rio Grande Railroad shall be entitled to the benefits of this act on its entire length as soon as it is completed from Point Isabel to Brownsville; and any other railroad which is less than fifty miles in length, according to the terms of its charter,

whenever one-half of its entire length has been completed and put in running order and the other half has been graded ready for the ties and other superstructure, shall be entitled to said loan on said completed section, which shall be expended for the completion of the entire road, and in no event shall said roads be entitled to said loan on more than one-half of its entire length.

SEC. 17. If any person making an affidavit as herein required shall knowingly swear falsely, he, upon conviction thereof before any court of competent jurisdiction, shall suffer all the pains and penalties of perjury.

SEC. 18. That it shall be the duty of any railroad company receiving the benefits of this act to make through its proper officers an annual report under oath, to the Governor, containing a full and complete statement of the affairs of said company together with the receipts, expenditures and liabilities of said companies and with such other facts as may be necessary, under the general laws regulating railroads and said railroad companies.

SEC. 19. That every railroad company, before it shall be entitled to the privileges of this act, shall establish upon the line of its road an office where books shall be kept, showing the state of its stock and general accounts, and where the company may be legally served with all notices and processes ; and the superintendent or principal manager of the transportation business of the road shall reside in this State. And, whenever a majority of the shares in the capital stock of the company shall be owned in this State, a majority of the directors, including the president, shall be residents thereof. And that this act take effect and be in force from and after its passage.

Passed August 13, 1856 (Gen. Laws of Texas, 6th Legislature, Adjourned Session, p. 31).

An Act authorizing treasury warrants to be received in payment of certain dues:

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Comptroller and Treasurer shall receive treasury warrants for money in settlement with any individual indebted to the State for lands under the different pre-emption laws, or laws authorizing the sale of University lands, or laws providing for the sale of the public domain. Provided that the Comptroller and Treasurer shall transfer to the credit of the University and Common School Fund such warrants as may be received in payment for lands appropriated for the University and for common schools, respectively. Which said warrants shall be paid out of any money in the treasury not necessary to pay other appropriations.

SEC. 2. The Board of School Commissioners are hereby authorized to receive treasury warrants in payments of the two per cent. for a sinking fund, payable by railroad companies in whose bonds the Special School Fund has been or may hereafter be invested; and said warrants shall be held for the credit of said Special School Fund in like manner as provided by law for the investment of said sinking fund in State stocks.

SEC. 3. Where treasury warrants are tendered under the provisions of this act in payment of any indebtedness, the interest shall be computed and allowed, and where the warrants exceed the indebtedness the holder shall be entitled to a warrant for the residue.

SEC. 4. That all laws and parts of laws conflicting with the provisions of this act be, and the same are hereby, repealed; and that this act take effect and be in force from and after its passage.

Approved February 9, 1861 (Page 19, Gen. Laws, Extra Session 8th Legislature).

CHAPTER XLVI.

An Act for the relief of certain railroad companies of the State of Texas:

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the payment of all interest and the two per cent. sinking fund due and to become due on the bonds issued by the several railroad companies of the State of Texas, for loans from the Special School Fund, be, and the same is hereby, extended until the 1st day of January, 1864, or until six months after the termination of the present war between the Confederate States and the United States of America, should it terminate before the time above named.

SEC. 2. That this act shall in no wise impair the prior lien which the State now holds upon any railroad for the payment of the loans and interest now due or to become due by such roads to the State.

SEC. 3. That this act take effect and be in force from and after its passage.

Approved January 11, 1862 (Gen. Laws of Texas, 9th Leg., p. 37).

CHAPTER LXIII.

An Act for the relief of railroad companies indebted to the State for loans from the Special School Fund :

WHEREAS, the political disturbances since the year eighteen hundred and sixty, by unsettling the business of the country, have largely contributed to prevent compliance on the part of railroad companies indebted to the State for loans from the Special School Fund, with their engagements respecting the payment of the principal and interest of said loans ; and,

WHEREAS, it is desired to relieve said companies from the liability of their railroads to sale consequent upon their non-compliance as aforesaid, therefore :

SECTION 1. Be it enacted by the Legislature of the State of Texas, that any railroad company indebted to the State for loans from the Special School Fund may avoid the sale of its railroad for the non-payment of principal or interest by the payment into the treasury of the State, on the first day of November, A. D. 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870, and by the payment, in addition, on said first day of November of one per cent. upon said aggregate amount, to be applied toward the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest, and one per cent. on account of said sinking fund semi-annually thereafter ; to wit, on the first day of May and November in each year.

SEC. 2. That if any railroad company shall fail to pay any amount required to be paid in section one of this act at the time designated thereby, or within ten days thereafter, then the whole debt of such company, principal and interest, shall become due, and the Governor shall proceed without delay to cause the railroad of said company and its franchises and property, so far as the lien or

mortgage of the State covers the same, to be sold, the sale to be in all respects (when not in conflict with this act) conducted according to the provisions of the statute of August thirteenth, A. D. 1856; provided, however, that in case the Governor should (for the protection of the School Fund) deem it necessary, he may buy in any road to be sold under this act, in the name of the State; provided, further, that if the whole principal and interest which may have become due as aforesaid, and all costs attending the advertisements and proposed sale, shall be paid before the day of sale, then the proceedings for sale shall be stopped.

SEC. 3. That the State of Texas will not exact of any railroad company not hereafter in default in respect to any of the payments required in this act the payment of the principal of the debt of said company, excepting said payments on account of the sinking fund as aforesaid, but that any company may pay the same in full at any time on thirty days' notice to the Governor, and that said lien or mortgage of the State shall not attach to any extension of its existing road hereafter constructed by any of said companies.

SEC. 4. That this act shall take effect from and after its passage.

Approved August 13, 1870 (Gen. Laws of Texas, 12th Leg., p. 85).

CHAPTER CXLVIII.

An Act for the relief of the Houston and Texas Central Railway Company :

WHEREAS, the Houston and Texas Central Railway Company has become the owner, by purchase, of the Washington County Railroad ; and,

WHEREAS, the Houston and Texas Central Railway Company and the Washington County Railroad Company are indebted to the State of Texas for sums borrowed from the Special School Fund ; and,

WHEREAS, the Houston and Texas Central Railway Company is desirous to extend the Washington County branch to the City of Austin, as soon as it can be done, and to build its main trunk to Red River in the shortest time possible, and also to build a branch road from some point in Navarro County so as to strike Red River at such point as will enable said Company to form a connection with any railroad that may be built southward from Kansas or Missouri to said river ; and,

WHEREAS, the ability of said Company to build said main trunk and branch roads would be greatly increased by the consent of the State to exchange the six per cent. bonds of the said companies, now held by the State, for the seven per cent. gold interest-bearing bonds of the said Houston and Texas Central Railway Company, issued by virtue of a deed of trust executed by said company on the first day of July, A. D. 1866, in which deed of trust Shepherd Knapp and David S. Dodge, of the City of New York, are named (and have accepted), as trustees ; and,

WHEREAS, it is believed that such exchange can be made without in any manner endangering the security of the school fund ; therefore :

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Washington County Railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston and Texas Central

Railway, and shall be under the control and management of the Houston and Texas Central Railway Company in like manner as every other part of the said railway; and the Houston and Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the "Washington County Railroad" from the Town of Brenham, in the County of Washington, to the City of Austin, in the County of Travis, by the most eligible route to be selected by the engineers of the company; and the said company shall also have the right to build a branch road diverging from the maintrunk at some point in Navarro County and striking Red River at such point as will enable said railway company to make a connection with any railroad which may be built to said river from the northward; and the said Houston and Texas Central Railway Company, by reason of the construction of the said railway from the Town of Brenham to the City of Austin, and by reason of the construction of the said branch from Navarro County to Red River, shall have and enjoy all the rights, privileges, grants and benefits that are now, or may at any time hereafter, be secured to any railroad company in the State of Texas by any general law of the State, and shall be subject in respect of said railway and said branch to all the duties and responsibilities imposed upon said Houston and Texas Central Railway Company by its charter and by other laws of the State.

SEC. 2. For the whole amount of principal and interest due to the State by the Houston and Texas Central Railway Company and the Washington County Railroad Company on the first day of July, A. D. 1870, the Governor of the State shall accept and receive from the Houston and Texas Central Railway Company the seven per cent. land grant sinking fund first mortgage gold interest-bearing bonds of said company, which said bonds, also payable in gold, are issued or to be issued by virtue of a deed of trust executed by the said company on the first day of July, A. D. 1866, and mature on the first of July, A. D. 1891, the interest on which is payable

on the first days of January and July of each year, in which deed of trust Shepherd Knapp and David S. Dodge, of New York, were named and accepted as trustees; and the Governor shall, after making the exchange of bonds herein provided for, cancel and deliver to said railway company the six per cent. bonds of the Houston and Texas Central Railway Company and of the Washington County Railroad Company now held by the State for sums borrowed from the School Fund, and the settlement and exchange of bonds herein provided for shall be made at any time that may be agreed upon by the Governor and the said railway company, between the passage of this act and the first day of December, A. D. 1870; and in making the settlement herein provided for the Houston and Texas Central Railway Company shall be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865 by the said company and by the Washington County Railroad Company upon the accounts on which said sums were respectively paid by said companies, the said sums amounting in the aggregate to $152,864.55; provided that the said Houston and Texas Central Railway Company shall never issue an amount of the seven per cent. bonds above described to exceed $20,000 to the mile of completed road, including such bonds as have been already issued, nor shall said company ever issue any other bond that shall rank as a first mortgage bond on its road, without first paying the whole amount of the indebtedness of the company to the State.

SEC. 3. The said Houston and Texas Central Railway Company is hereby authorized—any former laws to the contrary notwithstanding—to build its road through the Counties of Limestone and Navarro, on the most eligible route to be designated by its engineers; provided that the main trunk of said railway shall pass through the County of Dallas, and to a point on Red River within fifteen miles of Preston, as is now required by law, and shall be built as fast as the branch.

SEC. 4. No forfeiture of any of the rights or privi-

leges secured to it by existing laws shall be enforced against the said Houston and Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the first section of the act of the twenty-first of September, A. D. 1866, entitled "An act granting lands to the Houston and Texas Central Railway Company"; but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions embraced in the first section of the said act of the twenty-first of September, A. D. 1866, had been in all respects complied with; provided, that the land grant to said company shall cease unless the said company shall complete their main trunk, east of the Brazos River, to Richland Creek, in Navarro County, within twelve months from the first day of October, A. D. 1870, and shall also complete their road to the City of Austin within two years after the passage of this act.

SEC. 5. The branch road from Navarro County to Red River, provided for in the first section of this act, shall be to all intents and purposes in law a part of the Houston and Texas Central Railway, and shall be under the control and management of the said Houston and Texas Central Railway Company in like manner as every other part of the said railway.

SEC. 6. All laws and parts of laws now in force concerning the Houston and Texas Central Railway Company, or the Washington County Railroad Company, not in conflict with the foregoing provisions, shall not be affected by the passage of this act; and the State shall always have the right to interfere by such legislation as may be thought necessary to prevent neglect on the part of the said Houston and Texas Central Railway, so that the same may always remain an adequate security to the State for the amount that may be due by the company.

SEC. 7. This act shall take effect from and after its passage (Spec. Laws of Texas, 1870, p. 325).

No. 306. 81

Brief of Crane for D.

Filed Dec. 22, 1898.

Office Supreme Court U.
FILED
DEC 22 1898
JAMES H. MCKENNEY,

No. 306.

In the Supreme Court of the United States,

October Term, 1898.

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

M. M. CRANE, Attorney-General,
Attorney for Defendant in Error.

VON BOECKMANN, MOORE & SCHUTZE, AUSTIN, TEXAS.

No. 306.

In the Supreme Court of the United States,

October Term, 1898.

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This suit was instituted by the State of Texas, through its Attorney-General, in the District Court of Travis County, Texas, on the 5th day of December, 1894, alleging substantially the following facts:

1st. That the defendant company is incorporated under the general laws of the State of Texas.

2nd. Its general office and principal place of business is at Houston, Texas.

3rd. Its line of railroad runs into and through the county of Travis in the State of Texas.

4th. Its local agent at Austin, in said county, is H. D. Patrick.

5th. The State of Texas made loans under the provisions of an act entitled "An Act to provide for the investment of the special school fund in the bonds of railroads incorporated by the State,"

approved August 12th, 1856, to the Houston and Texas Central Railway Company, as follows:

On April 13, 1857, one hundred and fifty thousand dollars;
On October 28, 1857, sixty thousand dollars;
On May 21, 1858, sixty thousand dollars;
On July 6, 1858, thirty thousand dollars;
On February 23, 1859, thirty thousand dollars;
On June 15, 1859, thirty thousand dollars;
On July 22, 1859, thirty thousand dollars;
On August 2, 1859, thirty thousand dollars;
On August 20, 1859, thirty thousand dollars.

And said company executed and delivered to the State of Texas, in consideration of said loans, bonds as follows:

One dated March 25, 1857, for one hundred and fifty thousand dollars;
One dated September 22, 1857, for sixty thousand dollars;
One dated January 28, 1858, for thirty thousand dollars;
One dated February 23, 1858, for thirty thousand dollars;
One dated January 25, 1859, for thirty thousand dollars;
One dated May 14, 1859, for thirty thousand dollars;
One dated ....., 1859, for thirty thousand dollars;
One dated June 2, 1859, for thirty thousand dollars;
One dated July 29, 1859, for thirty thousand dollars.

Said bonds being to the effect that said company would pay to the State of Texas, at the office of its treasurer, in the city of Austin, ten years from the respective dates of said bonds, the said several sums of money; would pay each year two per cent. of said several sums as sinking fund, and would pay interest on each of them at the rate of six per centum per annum, and said bonds expressly acknowledging a lien created by the act aforesaid to secure payment of the loans made thereon.

By the loans aforesaid, and by the execution of said bonds, the said company promised and became liable to pay at the dates severally indicated the several sums of money (principal, interest and sinking fund) mentioned, and the State to secure payment of said sums became thereby invested with the lien aforesaid.

6th. The State of Texas made, under the provisions of the act aforesaid, and of an act approved January 28th, 1856, a loan to the Washington County Railroad Company on June 29th, 1859,

of sixty-six thousand dollars, and in consideration thereof the said company executed to the State its bond dated June 6th, 1859, to the effect that it would, ten years after the date thereof, pay to the State, at Austin, Texas, said sum, would pay, annually, two per cent. thereof as a sinking fund, and would pay interest thereon at the rate of six per cent. per annum, and acknowledging the lien created by the act aforesaid.

By the said loan and the bond aforesaid, the said company promised and became liable to pay the said sum at the time indicated and the said sinking fund and interest, and the State became invested with the lien aforesaid.

7th. That on or before the 15th day of August, A. D. 1870, the Washington County Railway became consolidated with and merged into the Houston and Texas Central Railway, and said Houston and Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railway Company.

8th. That the bonds aforesaid were not paid according to their tenor and effect, and the property upon which the lien aforesaid attached became liable to sale.

9th. That prior to the 15th day of August, 1870, the Houston and Texas Central Railway Company had constructed on its main line railroad as follows: A line of railroad completely constructed, beginning at the original terminus of said road, on the left bank of Buffalo Bayou, in the city of Houston, in Harris County, Texas, and running thence, in a general northwesterly direction, through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls and Limestone, including the 1st, 2nd, 3rd, 4th, 5th and 6th sections of twenty-five miles each, to a point one hundred and fifty miles to the place of beginning, about three miles south of Kosse, in Limestone County.

10th. That prior to the 15th day of August, 1870, the Washington County Railway Company, and the Houston and Texas Central Railway Company, had constructed of what is now known as the Western Branch of the Houston and Texas Central Railroad as follows: A line of railroad beginning at the point of junction of said Western Branch with the track of the main line of the Houston and Texas Central Railroad in the town of Hempstead, in Waller County; thence in a general westerly direction, through Waller and

Washington Counties for about twenty-one and one-quarter miles to a point in the town of Brenham, in Washington County.

11. That under the terms of said act of August 13th, 1856, and under the terms of the bonds aforesaid, a lien to secure payment of said bonds attached to all of said road, viz.: said one hundred and fifty miles of the main line of the Houston and Texas Central Railway, and twenty-one and one-quarter miles of the Western Branch thereof, and to all charter rights of said company or companies, including the road-bed, right of way, grading, bridges, iron rails, equipments and masonry, and to all stock subscribed for in said company or companies, and upon all depots and depot stations, all the property owned by said company or companies as necessary for their business.

12th. That on the first day of May, 1870, the aggregate amount due upon the bonds executed by the Houston and Texas Central Railway Company, principal and interest, was the sum of Six Hundred and Fifty-seven Thousand, Three Hundred and Twenty-four and 35-100ths Dollars ($657,324.35).

13th. That on the 1st day of May, 1870, the aggregate amount due upon the bonds executed by the Washington County Railway Company, principal and interest, was the sum of One Hundred and Three Thousand, Eight Hundred and Forty and 1-100 Dollars ($103,840.01).

14th. That the Houston and Texas Central Railway Company accepted the terms of the act of August 13th, 1870, entitled, "An Act for the relief of railroad companies indebted to the State for loans from the school fund," and thereby promised and became liable to pay, in addition to said sum of $657,324.35, and said sum of $103,840.01, semi-annually, on the 1st day of November and the 1st day of May of each year, six months' interest at six per cent. per annum on said aggregate amounts, and in addition thereto on said dates, a sinking fund of one per cent. of said amounts, in consideration of which promises the State by the terms of said law agreed not to make sale of the property upon which its lien existed as long as said payments were made.

15th. That thereafter to May 1st, 1879, said semi-annual interest and sinking fund was paid by the Houston and Texas Central Railway Company upon said sum of $103,840.01; but that no payment of principal or interest was made on November 1st, 1879, nor with-

in ten days thereafter, nor has any such payment been since made, and upon said failure to pay within ten days after the 1st day of November, A. D. 1879, the entire balance then remaining unpaid of said sum, amounting to $86,655.90, became at once due and payable.

16th. That up to and including the 1st day of May, 1893, the said semi-annual interest and one per cent. sinking fund was paid by said Houston and Texas Central Railway Company and defendant upon said sum of $657,324.35, but the next semi-annual interest and sinking fund was not paid, but the sum of $2,620 only was paid; the balance thereof was not paid, nor has it, or any part of it, since been paid; and upon said failure to pay within ten days after remaining then unpaid of said sum of $657,324.35, became at once due and payable.

17th. That upon said sum of $86,655.90, there had become due each six months from said 1st day of May, 1879, up to the present time, semi-annual interest at the rate of six per cent. per annum, and there is due upon each of said installments of unpaid interest, interest from the date upon which they respectively became due at the rate up to July 1st, 1891, of eight per cent., and since then of six per cent.

18th. That upon said sum of $411,935.84, there had become due upon May 1st, 1894, semi-annual interest at the rate of six per cent. per annum, and upon November 1st, 1894, a like amount, and since those dates upon said unpaid installments of interest at six per cent.

19th. That upon the 1st day of July, A. D. 1886, all the property of the Houston and Texas Central Railway Company, including the property upon which the State has the lien aforesaid, was sold judicially, and the purchaser and his associates formed under the laws of this State the corporation herein styled defendant.

20th. That said Washington County and Houston and Texas Central Railway Companies are defunct; that their corporate existence has been terminated; that neither of them has a president, directors, or other officers or stockholders, or other representatives, upon whom service may be had, and that there is no way of bringing said defunct corporations before this court.

21st. That the Houston and Texas Central Railroad Company, defendant, claims as the legal owner (subject to the lien heretofore

mentioned) and is in possession of all the property upon which the lien above set forth exists.

22nd. Plaintiff prays that judgment be given it, that there is due upon the obligations aforesaid the sums of money heretofore stated, with interest as set forth, and that payment thereof is secured by the liens on the property aforesaid; that said property be sold as under execution, and that the proceeds be applied to the payment of said sums with interest, and for costs; and that it have other relief, including the appointment of a receiver, as in the premises should be given.

To this defendant answered on the 6th day of February, 1895, and on May 15th, 1895, filed its first amended original answer, setting up the payment of certain amounts during the war between the States, in State treasury warrants, in addition to certain large cash payments therein pleaded.

On November 16th, 1895, appellee filed its first supplemental petition. This was subsequently amended on the 16th day of January, 1896. The amended supplemental petition consisted of demurrers and special pleas, setting up—

1. That the money borrowed by the railroad company constituted a part of the special school fund of the State of Texas, which had been previously appropriated as a permanent fund for the support of the public free schools, and that to permit these payments in worthless warrants, or anything else than money, would be a diversion of that school fund, and was therefore in contravention of Sec. 2, Art. X, of the Constitution of 1845, and as amended in 1861.

2. That the treasury warrants so issued were issued for the purpose of being circulated as money, and that they were so circulated and used by the State officers; that they were therefore void because in contravention of Sec. 8, Art. VII, of the Constitution of the State of Texas then in existence.

3. Because the said warrants so issued constituted bills of credit, within the meaning of Section 10, Article I, of the Constitution of the United States; and they were therefore void because said section of the Constitution prohibited their issuance by the States.

4. Because the acts of the Legislature authorizing the issuance of said treasury warrants, and the history of the times, show that they were issued for the purpose of aiding the then authorities of the State of Texas in prosecuting a war and rebellion against the

government of the United States; and that they were issued for the purpose of aiding the State in prosecuting said war and rebellion.

5. Because the people in the Constitutional Convention, assembled in 1866, by ordinance, declared all said warrants in which said pretended payments were made, to be utterly void and of no effect. And further, because Article XII, Section 36, of the Constitution of 1869, reiterated and repeated the same declaration.

6. That said warrants in which said payments were made were utterly worthless.

7. That said payments had been disallowed in 1870 by the then officers of the State, of which defendant had ample notice.

Plaintiff prayed that no credit be allowed by reason of the payments in said warrants, and if allowed, that they be allowed only to the extent of the market value of said warrants when paid to the State. (Tr., p.)

On the 16th of November, 1895, defendant filed its application, accompanied by bond, for the removal of the cause into the Circuit Court of the United States for the Western District of Texas, alleging in substance that the cause of action was one arising under the Constitution and laws of the United States. The application was denied. (Tr., p.)

All of the demurrers were overruled by the court, the case tried, and resulted in a judgment for the plaintiff for the sum of $673,-109.56, together with all costs of suit, and with a foreclosure of the lien mentioned in the petition, upon all of the property of the defendant. (Tr., p.)

STATEMENT OF UNCONTESTED FACTS.

As is shown by the statement of uncontested facts in appellant's brief, the following facts were established on the trial of the case:

1st. It was admitted by the defendant that the State of Texas made to the Houston and Texas Central Railway Company, and to the Washington County Railroad Company respectively, under the provisions of the act entitled "An Act to provide for the investment of the special school fund in bonds of railroads incorporated by the State," and approved August 13th, 1856, loans in the amount, and at the dates set forth in plaintiff's original petition, and that said companies executed and delivered to the State of Texas on the

dates and in the amounts set forth in said petition, the bonds described in the petition, in consideration of said loans.

2nd. It was admitted also that on or about the 15th day of August, 1870, the Washington County Railroad Company became consolidated with and merged into the Houston and Texas Central Railway Company, and that the said Houston and Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railroad Company. (Tr., pp.)

3rd. It was also shown that the appellant, the Houston and Texas Central Railroad Company, was incorporated under the general laws of the State of Texas by filing articles of incorporation in the office of the Secretary of State on the 1st day of August, 1889, by F. P. Olcott and his associates, the purchasers of the railroad and corporate rights and franchises of the Houston and Texas Central Railway Campany, including the Washington County Railroad, at the judicial sale thereof. (Tr., pp.)

4th. It was also admitted in connection with the introduction of the articles of incorporation of the defendant company that said company had been organized and was now existing under and by virtue of such articles of incorporation and at the time of the institution of this suit was in possession and claiming by proper deeds of conveyance from F. P. Olcott, and on such charter owned and operated the railroad and property described in plaintiff's original petition.

5th. It was also admitted by defendant in open court that all payments made on account of the loan to the Washington County Railroad Company after that company was merged into the Houston and Texas Central Railway Company in 1870, up to the time that such payments on account of the loan to the Washington County Railroad Company were discontinued in 1879, were made by the Houston and Texas Central Railway Company, and that all payments on account of the loan to the Houston and Texas Central Railway Company that were made after February, 1885, and prior to April, 1893, were made by the receiver of the property and affairs of said railway company; and that all the payments on account of said loan paid subsepuent to April 1st, 1893, were made by the Houston and Texas Central Railroad Company, the defendant in this case.

6th. It was shown, as stated by appellant in his brief, that the payments made in treasury warrants as averred by it, were accepted by the Comptroller and Treasurer of the State, and that credit was at the time duly given by the Comptroller on the books of his department; but in that connection it should be stated that said credits were soon thereafter repudiated, and that the State authorities have never since admitted that they were proper credits, but on the contrary have insisted that said payments were void, and should be disregarded. (Tr., p.)

7th. It was also shown that the Washington County Railroad Company had no officers, and no one upon whom service could be had. (Tr., p. 230.)

8th. It was shown that all of the property of the Washington County Railroad Company after it had been merged into the Houston and Texas Central Railway Company in 1870, was operated by the latter company until its property and affairs had passed into the hands of a receiver in 1885; and it was operated by said receivers until April 10th, 1893, and passed with the other lines of the Houston and Texas Central Railway Company to F. P. Olcott, by a foreclosure sale in 1888, and from Olcott to this defendant, organized and incorporated under articles of incorporation filed August 1st, 1889. (Tr., p.)

9th. It was also proven that the Governor had given authority to the Attorney-General to institute this suit. (Tr., p.)

The defendant in the court below pleaded various payments in cash and also certain payments made in treasury warrants, alleged to have been issued by the State of Texas. The facts charged in the original petition, that is to say, the lending of the money and the execution of the bonds, were admitted by the defendant. (See Rec., p. .)

There was no contest made over the cash payments, and, indeed, there was no contest over the fact of the delivery of the treasury warrants to the proper officers of the State, as alleged in the defendant's answer, but the State, by a supplemental petition, charged that these warrants were void for various reasons.

FIRST.—*Because they were issued for the purpose of being circulated as money in contravention of Section 8, Article VII, of*

the State Constitution of 1845. So much thereof as is applicable reads as follows:

"And in no case shall the Legislature have power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." (Sayles' Texas Statutes, Vol. 4, p. 208.)

In 1861, in the effort to make secession successful, the State Constitution was amended so as to conform to the general purpose manifested by the Secession Convention. In this Constitution, however, Section 8, Article VII, was carried forward without any change. The portion of the section in point of the Constitution as amended in 1861 reads as follows:

"And in no case shall the Legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." (Sayles' Texas Statutes, Vol. 4, p. 345.)

SECOND.—*Because they were bills of credit, prohibited by Sec. 10, Art. I, of the Federal Constitution.*

THIRD.—*Because they were issued in aid of the rebellion.*

FOURTH.—*Because the railroads were enabled to purchase them in the market for a nominal, insignificant and trifling sum, and sought to compel the State to take them at par.*

That as soon as peace was restored, the acceptance of these depreciated warrants in payment of debts justly owing by the railroad companies was immediately repudiated by the lawful officers of the State of Texas, and that ever since said date of said repudiation the State has maintained that said payments were illegal and unlawful, of which said fact the defendant company had ample and abundant notice.

On the filing of this supplemental petition, or soon thereafter, the defendant company filed a motion to remove the cause to the Federal Court, accompanied by proper bond. The motion was denied. (Record, p.) Trial resulted in a judgment for the plaintiff in the sum of six hundred seventy-three thousand one hundred and nine dollars and fifty-six cents ($673,109.56), and a foreclosure of the lien on the property of the railroad company. The plaintiff in error company perfected an appeal to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. The case was by that court reformed and affirmed. The

Court of Civil Appeals found as a fact that the warrants in which the payments were made were issued during the war and for the purpose of being circulated as money. That tribunal also found that as a matter of law they were void because issued in violation of Section 8, Article VII, of the State Constitution, which prohibited warrants being issued for that purpose. That therefore it must be judicially treated as if no warrants had ever been issued at all because a void warrant was equivalent to no warrant, and therefore no warrants were ever paid to the State because void warrants cannot be given any validity. The portion of the opinion of the Court of Civil Appeals dealing with this subject reads as follows:

"The second and principal question which arises is whether the payments made by the railway company in State treasury warrants are valid and binding upon the State. This question presents really the only controversy between the parties. Section 8, Article 7, of the Constitution of 1845 states that in no case shall the legislature have power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money. The warrants which were paid upon the obligations due the State were issued under acts of the legislature of the State when that provision of the Constitution was in force. The various acts of the legislature of the State during the period of the war concerning the State revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used, and the amount for which they could be issued, together with the size, shape and color of the warrants issued, and the small amounts in which warrants were issued, together with the history of the times and the well known depleted condition of the treasury during that period, together with the scarcity of existing, reliable and available circulating medium as money, convinces us that it was the purpose of the various acts of the legislature during that time to give to the warrants issued during that period, as much as possible, a standing and character as money. The scarcity of money and the necessities of the State and the public were evidently inducements to the legislature sitting during this period to provide uses to which warrants might be put in the way of requiring State officers and authorizing railways to receive them in payment of debts due them. The evident purpose was to give to the warrants in certain instances a debt-paying power in order that they might be given an advanced value and might be used in some respects as money. When the warrants were issued it was not expected and intended that they should be immediately paid, for the State was not then in a condition to pay them, nor was the intention solely that they should serve the legal purpose of evidences of debt against the State. But the character of legislation during the period during the war clearly indicates that the purpose was to give to these warrants the added quality of money as far as it lay in the power of the legislature to accomplish that result. To set out all the acts of the legislature bearing upon this subject, together with all the facts which we have considered in connection therewith, with the well known matters of history relating thereto would unnecessarily prolong this opinion. Therefore, we close this branch of the case with the statement that *in our opinion the war-*

rants of the State issued during the period of the war, after January 1, 1862, were intended to be used and circulated as money, and in this connection it is well to say that we are of the opinion from all there is shown from the record that the payments made by the railway companies upon the obligations sued upon were in warrants issued *after the time we have declared they were intended to circulate as money.* What is said in this connection relieves us from passing upon the interesting questions upon the burden of proof with reference to the alleged payments." (40 S. W. Rep., 1099-1101.)

A writ of error was applied for to the Supreme Court of the State and was refused, and the case was brought to this court by writ of error.

Motion to dismiss writ of error for want of jurisdiction has been made.

The plaintiffs have made numerous assignments of error, but really, there are but few questions involved in the record. They may safely be considered under the following heads:

1. The claim that error was committed in denying the motion to remove the cause to the Federal Court.

2. In holding that the warrants in which the payments were made were invalid because issued in violation of Section 8, Article VII, of the State Constitution of 1845.

Dissenting from all the propositions made by plaintiffs in error, a copy of whose brief has not been furnished State's counsel, the following counter-propositions are submitted:

DEFENDANT'S IN ERROR FIRST COUNTER-PROPOSITION.

The statement of plaintiff's claim or cause of action in the original petition discloses no Federal question. The cause was, therefore, not removable to the Federal Court.

STATEMENT.

Plaintiff's s atement of its cause of action is contained in the original petition. (R., p. .) The original petition discloses that it was an action for debt created by loaning money to the railroad corporations therein named, which indebtedness was evidenced by bonds fully described therein, and to secure which a lien was given upon the property therein mentioned. It was simply a foreclosure proceeding without even the suggestion of a Federal question.

AUTHORITIES.

Tennessee vs. Bank, 152 U. S., 455-464.
Chappell vs. Waterworth, 155 U. S., 102.
P. T. C. Company vs. Alabama, 155 U. S., 487.
East Lake Co. vs. Brown, 155 U. S., 488.
Galveston, Harrisburg and San Antonio Railway Co. vs. Texas, 170 U. S., 226.

ARGUMENT.

The rules of pleading adopted by the Texas courts require the plaintiff's claim or cause of action to be stated in the original petition, or the amended original petition, which is a complete instrument itself. Replication to defensive matter must be made in a supplemental petition. A supplemental petition is, in the strictest sense, a replication, as the following rules prescribed by the Supreme Court of the State will disclose.

"THE PETITION.

"3. The petition of the plaintiff shall consist of an original petition and such supplemental petitions as may be necessary in the course of pleading by the parties to the suit, to enable the plaintiff to state all the facts presenting his cause of action, and such other facts as may be required to rebut the facts that may be set up in the original or supplemental answer, as pleaded by the defendant. The original petitions and the supplemental petitions shall be indorsed so as to show their respective positions in the process of pleading, as "original petition," "plaintiff's first supplemental petition," "plaintiff's second supplemental petition," and so on, to be successively numbered, named and indorsed.

"ORIGINAL PETITION.

"4. The plaintiff, in the original petition, in addition to the names and residences of the parties and the relief sought, may state all of his facts so as to present together different combinations of facts, amounting to a cause or causes of action, as has been the usual practice, or he may state the cause or causes of action in several different counts, each within itself presenting a combination of facts specifically amounting to a single cause of action, which, when so drawn, shall be numbered, so that an issue may be formed by each one by the answer.

"PLAINTIFF'S SUPPLEMENTAL PETITION.

"5. The plaintiff's suplemental petition may contain exceptions, general denial, and the allegations of new facts not before alleged by him, in reply to those which have been alleged by the defendant." (*Rules 3, 4 and 5, 84 Texas, 708.*)

These rules are recognized by the following authorities:

Grabenheimer vs. Blum, 63 Texas, 369-373.

Insurance Company vs. Camp, 64 Texas, 521-525.

An analysis of the above rules will show that every allegation necessary to support a judgment or decree in favor of the State must be made in the original petition. It will be seen that the original petition in this case complied with those rules. If the defendant company had plead only a general denial a judgment would have been obtained against it by proving the statements made in the petition. To avoid the case thus made it became necessary for the defendant company to specially plead payment.

Cartright vs. Jones, 13 Texas, 4.

Gray vs. McFarland, 29 Texas, 169.

This rule the defendant company recognized, and pleading payments, it assumed the burden of proving them. Plaintiff's supplemental petition was a reply to this plea of payments. It could not be said to contain, in any sense, a statement of the plaintiff's claim or cause of action; indeed, the claim or cause of action, as stated in the original petition was admitted on the trial, it being admitted that the plaintiff in error, and the Washington County Railroad Company, whose line of road plaintiff in error had absorbed, had borrowed the special school fund and executed their bonds therefor as charged in the plaintiff's original petition. (Rec., p.)

It was proven on the trial that the Houston and Texas Central Railroad Company took the property of the Washington County Railroad Company subject to the State's lien thereon. (Rec., p.)

The bonds, the execution and delivery of which were charged in said petition, expressly acknowledged the existence of a lien created by the mortgage to secure the payments of the loans made thereunder. It is plain, therefore, that the supplemental petition complied with the rules in that it was, in the strictest sense, a reply to the defenses pleaded, and contained no part of the statement of the plaintiff's cause of action. There was, therefore, no error in denying the motion to remove.

SECOND COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

This court has no jurisdiction of the subject matter of this case

for the reason that the decision of the State court was based upon one conclusion of fact and one conclusion of law, the conclusion of fact being that the warrants in which the payments were made were issued during the war for the purpose of being circulated as money; and the conclusion of law being that they were issued in violation of Section 8, Article VII, of the State Constitution, and were therefore void. (R.)

STATEMENT.

The Court of Civil Appeals in deciding this case said:

"The second and principal question which arises is whether the payment made by the railway company in State treasury warrants are valid and binding upon the State. This question presents really the only controversy between the parties. Section 8, Article 7, of the Constitution of 1845, states that in no case shall the legislature have power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money. The warrants which were paid upon the obligations due the State were issued under acts of the legislature of the State when that provision of the Constitution was in force. The various acts of the legislature of the State during the period of the war concerning the State revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used, and the amounts for which they could be issued, together with the size, shape and color of the warrants issued, and the small amounts in which warrants were issued, together with the history of the times and the well known depleted condition of the treasury during that period, together with the scarcity of existing, reliable and available circulating medium as money, convinces us that it was the purpose of the various acts of the legislature during that time to give to the warrants issued during that period, as much as possible, a standing and character as money. The scarcity of money and the necessities of the State and the public were evidently inducements to the legislature sitting during this period to provide uses to which warrants might be put in the way of requiring State officers and authorizing railways to receive them in payment of debts due them. The evident purpose was to give to the warrants in certain instances a debt-paying power in order that they might be given an advanced value and might be used in some respects as money. When the warrants were issued it was not expected and intended that they should be immediately paid, for the State was not then in a condition to pay them, nor was the intention solely that they should serve the legal purpose of evidence of debt against the State. But the character of legislation during the period during the war clearly indicates that the purpose was to give to these warrants the added quality of money as far as it lay in the power of the legislature to accomplish that result. To set out all the acts of the legislature bearing upon this subject, together with all the facts which we have considered in connection therewith, with the well known matters of history relating thereto would unnecessarily prolong this opinion. Therefore, we close this branch of the case with the statement that *in our opinion the warrants of the State issued during the period of the war, after January 1, 1862, were intended*

to be used and circulated as money, and in this connection it is well to say that we are of the opinion from all there is shown from the record that the payments made by the railway companies upon the obligations sued upon were in warrants issued *after the time we have declared they were intended to circulate as money*. What is said in this connection relieves us from passing upon the interesting questions upon the burden of proof with reference to the alleged payments."

ARGUMENT.

It will be noted that in the above decision the court did not pass on any Federal question.

THIRD COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

The decision of the Court of Civil Appeals on the question of fact involved in the record to the effect that the warrants in question were issued during the war between the States and for the purpose of being circulated as money is conclusive on this court.

AUTHORITIES.

Egan vs. Hart, 165 U. S., 188.
Backus vs. Fourth Street Depot Co., 169 U. S., 557.
Halloway vs. Dunham, 18 Sup. Rep., 184.
Harrison vs. Perea, 168 U. S., 311.

FOURTH COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

The warrants in which the payments were made, issued for the purposes above named, that is, for the purpose of being circulated as money, the Court of Civil Appeals held to be void because in contravention of Section 8, Article VII of the State's Constitution, and that decision is conclusive on this court and not open to review.

AUTHORITIES.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685.
Merchants and Manufacturer's Bank vs. Penn., 167 U. S., 181.
Backus vs. Fourth Street Depot Company, 169 U. S., 557.
Chicago, etc., Ry. Co. vs. Minnesota, 134 U. S., 418.

ARGUMENT.

No Federal question having been decided, there is nothing for

this court to review, and the writ of error ought to be dismissed. Had the Court of Civil Appeals held that the warrants in question were issued in violation of the Federal Constitution, as well as in violation of the State Constitution, this court would not, under the authorities above cited, be authorized to assume jurisdiction, because the decision would then rest on two grounds, one of which would be a construction of the State Constitution, the other a construction of the Federal Constitution., The construction of the State Constitution is sufficiently broad, and on it the decision could, even in that event, be fairly rested. Had the court so decided, it would not change the result to ascertain that the court was wrong in its sonstruction of the Federal Constitution, because its construction of the State Constitution is not open to review, and that construction controls the result of the case.

AUTHORITIES.

This rule will be adhered to although the court may believe that the decision by the State court of the Federal question was erroneous.

Klinger vs. Missouri, 13 Wall., 257.

But, as before suggested, the court having rested the decision entirely on the State Constitution, this court is without jurisdiction. But if the court takes jurisdiction of this case and undertakes to determine the questions involved, then it is respectfully submitted that there was no error in the findings of the court below on both questions of law and fact. The court found that the warrants in which the payments were made were issued after January 1st, 1862, and that they were issued for the purpose of being circulated as money, and on this subject we make the following additional counter-propositions:

FIFTH COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

The record conclusively shows that the warrants in which

the payments were made were issued during the war between the States and after January 10th, 1862. As the statement of the nature of the suit indicates, this was a suit by the State for debt and foreclosure of a lien on the railroad property. The defendant answered by plea of payment in cash and treasury warrants. (R.) It was agreed that the indebtedness existed as charged in the original petition. Plaintiff, by supplemental petition, alleged that the warrants in which the payments were made were void because issued during the war, and that they were void, among other reasons, 1st, because they were issued for the purpose of being circulated as money, in violation of the provisions of the State Constitution; 2nd, because they were bills of credit, the issuance of which was prohibited by the Federal Constitution, and 3rd, because they were issued in aid of the rebellion.

STATEMENT.

To establish the plea of payment certified copies from the Comptroller's record, showing the payments in treasury warrants, were made, as plead. (R.). The proof offered by the applicant, however, did not show the character, dates, or denominations of the warrants in which the payments were made. The State offered a transcript from the Comptroller's record showing that at divers dates during the war, and particularly on the 28th day of February, 1865, and the 31st day of May, 1865, there was on hand in the State Treasury warrants which the record recited were paid by the railroad companies on principal and interest due the school fund amounting to more than $320,000 (R.). $287,812.93 of these warrants were payable in 8 per cent. bonds, while $32,554.20 were payable in six per cent. bonds. The warrants in which these payments were made being fundable in these two classes of securities, can be easily identified. The same pages of the record showing these payments in Treasury warrants that were on hand in the State Treasury disclose that there was in the State Treasury at the same time $11,239.71 in interest bearing warrants. A necessary inquiry then is, by what authority were the interest bearing warrants issued? By what authority were certain of those warrants fundable in 8 per cent. bonds? and by what authority in 6 per cent. bonds? Taking these questions in the order presented, they can be easily answered. In the acts of the Texas Legislature

of 1860, on pages 115 and 116, a provision was made for the issuance of interest bearing warrants. It reads as follows:

"When an account shall hereafter be presented for payment for which an appropriation has been made, it shall be the duty of the comptroller to audit and allow the claim if legal, and to issue his warrant for the amount, and if there be no money in the treasury to pay the demand, then the comptroller shall issue his warrant upon the treasurer for the amount with ten per cent. per annum interest * * which warants shall be signed by the governor, and shall be endorsed by the treasurer.

"Sec. 2. That it shall be made the duty of the comptroller, on the first day of July, 1860, and every six months thereafter, to advertise in three papers in different parts of the State for the presentment of any such warrants as are mentioned in the first section of this act in the order of their dates and numbers, and after the expiration of sixty days from such notice, said warrants not presented shall cease to draw interest. *Said warrants shall not circulate as money, but may be assigned.*

"Sec. 3. That this act shall take effect and be in force from and after passage."

Approved February 14th, 1860.

It may be safely assumed that all warrants issued by Texas subsequent to the date of this Act and before its repeal, bore interest at the rate of 10 per cent. per annum. It must also be apparent that very few of these warrants were issued, because in May, 1865, there were less than $12,000 of them in existence, and they are not classed among the warrants in which any payments were made on the school fund. The Act authorizing the issuance of these interest bearing warrants was repealed on the 10th day of January, 1862, and in the following language:

"Section 1. Be it enacted by the Legislature of the State of Texas: That an act authorizing unpaid warrants to bear interest, approved February 14th, 1860, is hereby repealed, but without prejudice to the vested rights of the owners of such warrants, which shall be available as if said act were not repealed.

"Sec. 2. The comptroller, on presentation of any warrant bearing interest, as well as the presentation of any other legal claim for which an appropriation shall have been made, shall draw on the treasury as heretofore prescribed by law, and payment shall be made thereon if there be money therefor in the treasury, but if not the comptroller shall issue one or more warrants for the amount that may be due and payable to the party entitled to payment, or bearer, and said warrants shall be of such proportions of the claim as may be expressly required by the holder; provided, that not more that one-tenth of the whole amount may be issued in warrants of one dollar each, and the balance of five dollars or more each, and said warrants shall be endorsed by the treasurer, and every interest bearing warrant that is superceded shall be cancancelled by the comptroller.

"Sec. 3. The warrants issued in pursuance of this act on presentation at the treasury shall be paid out of any money therein not otherwise appropriated, and when paid shall be cancelled, and shall not be re-issued.

"Sec. 4. That this act take effect and be in force from and after its passage."

Approved January 10th, 1862. *(Acts of 1862, page 34.)*

It will be seen by this last quoted act that these non-interest bearing warrants were authorized to be issued on the 10th day of January, 1862.

On April 8th, 1861, the Texas Legislature passed a war measure which reads as follows:

"An act authorizing a loan and imposing a specific tax to meet the principal and interest thereof, under the provisions of the 33rd section of the 7th article of the Constitution of the State.

"Section 1. Be it enacted by the Legislature of the State of Texas: That the governor of the State shall cause to be executed the bonds of the State for the sum of one million of dollars in sums of one thousand dollars each, redeemable in sixteen years, and bearing interest at the rate of eight per centum per annum, payable semi-annually; with coupons for the semi-annual interest attached, payable on the first day of July and the first of January of each year. The bonds shall be signed by the governor and treasurer, and shall be registered by the comptroller, who shall certify the fact of such registration on the back of the bonds, and the coupons shall be signed by the treasurer. The bonds and coupons shall be payable at some bank in the city of New Orleans, in the State of Louisiana.

"Sec. 2. The governor shall appoint an agent to negotiate the sale of said bonds from time to time, and to place the proceeds of such sales in some bank in the city of New Orleans to be subject to the order of the Comptroller of the State, and by him to be placed in the State treasury. Said agent shall be governed in his negotiations by the instructions of the governor.

"Sec. 3. The proceeds of sales of said bonds shall be applied to the following objects and no other purpose whatever: To the payment of all indebtedness of the State created for the defense of the frontier, and to the payment of appropriations which have been or may hereafter be made for the military defense of the State. To the repayment of all the disbursements made from the treasury or anticipated from the accruing revenue of the State, or from any special fund or funds in the State treasury to meet the appropriations to pay the expenses of the State Convention, and of the extra and adjourned sessions of the Eighth Legislature.

"To the payment of all appropriations made to meet the debts created or incurred by authority of the State convention, and to meet any deficit in appropriations made to meet the expenses of said convention, and of the expenses of the extra and adjourned sessions of the Eighth Legislature.

"To the payment of any deficit in the appropriations made to meet the ordinary expenses of the government for the year 1861, arising from the anticipation of the revenue to meet extraordinary demands.

"Sec. 4. There shall be levied and collected, to pay the interest on said bonds as they fall due, and to pay and discharge the principal thereof, a specific, direct annual ad valorem tax of four cents upon each hundred dollars value

of property, real and personal, in this State (except such property as is now exempt by law from taxation), which tax shall be levied and collected by the same persons, and at the same time and in the same manner as is or may hereafter be provided by law for the collection of the direct ad valorem State tax, to meet the ordinary expenses of the State government, and all laws now or which may be hereafter in force in this State for the levying and collection of other direct State taxes for the use of the State, shall also apply to the levying and collection of the specific direct annual ad valorem tax of four cents upon each hundred dollars value of property, real and personal, as authorized by this act. No part of the specific tax authorized by this section shall be appropriated to any other purpose whatever, but exclusively to the payment of the principal and interest of the loan specified in this act.

"Sec. 5. For the payment of the principal and interest of said bonds, the faith of this State is pledged, in addition to the specific tax herein specified and pledged.

"Sec. 6. The specific tax imposed by this act shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made full provision to pay and discharge the principal and interest of the bonds provided by this act. Provided, that whenever the State shall have retired and cancelled one-fourth of this issue of one million dollars of bonds, it shall be the duty of the Comptroller of this State to decrease the specific tax herein provided for one cent on the one hundred dollars of the value of the real and personal property assessed; and upon the retiring of each additional sum of two hundred and fifty thousand dollars of this issue of bonds, one cent on the one hundred dollars of said specific tax shall be taken off.

"Sec. 7. The money realized by the specific tax provided for in this act shall be applied first to the payment of the interest coupons maturing upon this issue of bonds, and the residue shall be deposited in the State treasury, and constitute a special sinking fund for the redemption of the principal of said bonds.

"Whenever fifty thousand dollars of said sinking fund shall have accumulated in the treasury, it shall be the duty of the governor to cause the comptroller and treasurer to invest said amount in the redemption of said bonds. For which purpose the comptroller shall give thirty days' notice by publication in one newspaper printed in the city of New Orleans, and one in the city of Austin, that he will redeem or purchase said amount of bonds from the lowest bidder, and he shall receive sealed proposals therefor, to be opened by him in the presence of the governor and treasurer, and they shall redeem the bonds offered at the lowest rate. Provided, that in no instance shall said officers pay a higher rate for said bonds than ten per centum premium on their par value; and further provided, that in case they can not be purchased at a rate within the limits aforesaid, then the said officers may invest said sinking fund in the bonds of the Confederate States of America; provided, they can be obtained within the same limits as to price. And said Federal bonds shall be placed in said special sinking fund.

"Sec. 8. The plate upon which the bonds are engraved shall be returned to the governor and comptroller, with the bonds, and shall be by them destroyed.

"The agent appointed by the governor for the purpose herein contemplated, may be allowed such reasonable compensation for his services as shall be agreed upon and established by the governor, comptroller and treasurer, or a majority of them.

"Sec. 9. Five thousand dollars, or so much thereof as may be necessary,

is hereby appropriated to defray the expenses incurred in carrying out this act. act.

"Sec. 10. The specific tax provided for by this act shall be imposed on the assessments of the present year.

"Sec. 11. That this act take effect and be in force from and after its passage."

Approved April 8th, 1861.

This Act, it will be noted, authorized the issuance of $1,000,000 worth of bonds in sums of $1,000 each bearing interest *at the rate of eight per cent. per annum.*

The 33rd section of the Act was amended on January 11th, 1862. The amendment reads as follows:

"An act to amend the second and third sections of an act entitled 'An act authorizing a loan and imposing a specific tax to meet the principal and interest thereof, under the provisions of the 33rd section of the 7th article of the Constitution of the State.' Approved April 8th, 1861, and supplementary to said act.

"Whereas, no bonds have been issued or negotiated under the provisions of the act recited in the caption hereof,—therefore—

"Section 1. Be it enacted by the Legislature of the State of Texas: That the second section of said act recited in the caption hereof is hereby amended so that the same shall hereafter read as follows, viz:

"'The governor, comptroller and treasurer, or a majority of them, may, in their discretion, appoint an agent or agents to negotiate the disposition or sale of said bonds from time to time; and in case the bonds are sold for money the proceeds of such sales shall be placed in some bank in the city of New Orleans subject to the orders or drafts of the comptroller of the State for State purposes, or shall be paid into the State treasury at Austin, as shall be directed by the authority appointing such agent or agents. All agents appointed under the provisions of this act shall be governed in their negotiations by the instructions of the authority appointing them; and the governor, comptroller and treasurer, or a majority of them, may, without the interposition of any agent, negotiate the disposition or sale of said bonds for the purposes of this act.

"Sec. 2. The third section of said act recited in the caption hereof, is hereby amended so that the same shall hereafter read as follows, viz:

"The said bonds, or the proceeds of the sale thereof, shall be applied to the following objects and no other purpose whatever:

"1st. To the satisfaction or payment of appropriations which have been or may hereafter be made for the purchase of arms and munitions of war, or for the manufacture of arms and ordnance.

"2nd. To the satisfaction and payment of all indebtedness incurred by the State convention or under its authority, and to meet any deficit in appropriations made to meet the expenses of said convention, in case said bonds can be so used.

"3rd. To the funding of any indebtedness of the State, present or future, to the payment of all indebtedness of the State created for the defense of the frontier, and to the payment of appropriations which have been or may here-

after be made for the military defense of the State. To the payment of all disbursements made from the treasury or anticipated from the accruing revenues of the State, or from any special fund or funds in the State treasury to meet appropriations to pay the expenses of the State convention, and of the extra and adjourned sessions of the legislature. To the payment of any deficit in the appropriations made to meet the ordinary expenses of the government for the year 1861, arising from the anticipation of the revenues to meet extraordinary demands.

"Sec. 3. The bonds and coupons authorized by said act shall be payable at some bank in the city of New Orleans, in the State of Louisiana, or at the treasury of the State, at the option of the holder of the same; and in case any such holder shall elect to receive such payment at the treasury of the State he shall give notice thereof in writing to the treasurer of the State thirty days before the maturity of such bond or coupon. The tax assessed under and by virtue of said act shall be collected in gold or silver only, any law to the contrary notwithstanding. And this act shall be in force from and after its passage."

Approved January 11th, 1862. *See Acts of 1862, page 42.*

The 3rd subdivision of this last named act makes provision for the funding indebtedness of the State, present and future. This was supplemented on the 13th day of January, 1862, by an act which reads as follows:

"An act to authorize and regulate funding and loan bonds.

"Section 1. Be it enacted by the Legislature of the State of Texas: That any audited indebtedness of the State shall be receivable in payment for its loan bonds.

"Sec. 2. Any indebtedness of the State for any special fund which has been or may be used by the State under any law shall be substituted as far as practicable by loan bonds of the State which shall inure to the benefit of the interest entitled to such funds until it shall be reimbursed and the bonds be thereby re-purchased when they shall be subject to re-sale as if they had never been so used, and such adjustment shall be made by the governor, comptroller and treasurer acting by a majority."

See Acts of 1862, page 40.

It will be seen that the Act of April 8th, 1861, providing for the issuance of bonds bearing 8 per cent. interest authorized no indebtedness to be funded therein, but provision was made for the funding indebtedness on the 11th day of January following, by the acts passed respectively on January 11th, 1862, and January 13th, 1862. The Act of January 11th, 1862, authorized the funding of all indebtedness of the State, *present and future.* The fact that in 1865 there could not be found in the State Treasury but little more than $11,000 in interest bearing warrants shows that there could not have been such indebtedness prior to 1862, because

all unpaid appropriations were to be covered by interest bearing warrants, and in 1862 that law was repealed. And in 1865, only five years later, it was seen that there was $320,000 worth of the other warrants, the non-interest bearing warrants being fundable in the bonds of the character heretofore mentioned, in the State Treasury, all of which had been paid on the school fund indebtedness—that is the indebtedness now in question. But it is plain that the executive officers at the time did not understand that the interest bearing bonds, issued under the Act of 1860, were fundable in any kind of bonds. The entry of the amount of interest bearing warrants on hand is made in one item. The entry of the warrants fundable in 8 per cent. bonds in another item, and those in six per cent bonds in still another item. So that we are informed by the executive construction given at the time that the 10 per cent. warrants were not included in the indebtedness which was fundable. But apart from this executive construction it is reasonable to suppose that Texas had no outstanding warrants in December, 1863, which were issued before the war. The language of the first funding act leaves no room for doubt on that point. The provision of that act is that these bonds, or the proceeds of the sale thereof, shall be applied to the funding of any indebtedness of the State, *present* or *future*, but not past indebtedness.

The Act of the 13th of January, 1862, above quoted, provides that any audited claim shall be funded in these bonds. Its second section declares that any indebtedness of the State for any special fund "which has or may be hereafter used by the State under any law shall be substituted so far as practicable by loan bonds of the State which shall inure to the benefit of such fund until it shall be reimbursed and the bonds shall be purchased." The meaning of "audited claims" mentioned in the first section of the act is fully explained by the Act of January 4th, 1862, which reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the comptroller of public accounts be and he is hereby authorized and required to audit and settle the claims of the officers and privates of all volunteer companies ordered out by the governor or committee of safety, acting by authority of the People's convention for and during the term of service actually rendered to the State according to the rules of the Confederate States for the government of the army thereof, upon the return of the muster roll of the company to the comptroller duly authenticated; and also to audit and allow all claims or accounts brought against the State by any individual for quartermaster or commissary supplies, for munitions of war, for the con-

struction of fortifications and all defences and money advanced for the same, and for moneys or supplies advanced for and used by any of said troops; provided, all such claims and accounts are authenticated and approved by the acting quartermaster or commissary of the regiment, battalion or company; and in every case where any supplies or article necessary to the efficiency of the command shall have been purchased by any colonel, lieutenant-colonel of a regiment, or captain of a company and not certified to by the acting quartermaster or commissary, said colonel or lieutenant-colonel shall certify under oath that the charges are just and that such articles were purchased at the price mentioned, and were used for the benefit of said command; provided, such articles are consistent with the usage and regulations of the army with reference to the nature of the service.

"Sec. 2. In all cases provided for under the first section of this act the comptroller shall draw his warrant upon the treasurer in favor of any party whose claim or account shall have been so audited or allowed; provided, in all cases the comptroller shall have the power to examine the accounts and allow only such as are fully authenticated by proper vouchers, and to reduce extravagant charges to a reasonable amount; provided, this act shall not be so construed as to allow the payment of expenses at the camps of instruction or any troops not called into active service.

"Sec. 3. That the comptroller shall keep a separate register of all claims presented under this act and properly chargeable to the government of the Confederate States, and arrange the vouchers and accounts as directed by the laws of the State government for presentation thereto.

"Sec. 4. Be it further enacted, that the sum of three hundred thousand dollars, or so much thereof as may be necessary, be and is hereby appropriated out of any money not otherwise appropriated to carry out the provisions of this act.

"Sec 5. That this act take effect and be in force from and after its passage."

Approved January 4, 1862. *See Acts of 1862, pages 29, and 30.*

It will be seen that when the Legislature, on the 13th day of January, 1862, provided that any audited indebtedness should be receivable for these eight per cent. bonds included all the indebtedness incurred for the military defenses of the State for which warrants should be issued. Of course, the claims for military defense, authorized by the Act of 1862, would be evidenced by warrants bearing a later date, that is, bearing a date, at least as late as January 10th, 1862. This is also made clear by the Act of January 11th, 1862, which reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That all the specific taxes for the object of paying interest and principal of loan shall be collected in specie currency.

"Sec. 2. The treasury warrants not bearing interest, in addition to the provision heretofore made for their reception for payment on lands, including warrants therefor, shall be receivable *as money* in the payment of taxes, office fees (including fees for patents) and land dues payable in the general land office of Texas, and all other dues to be collected for the State, or in its

name, except specific taxes for the object of paying interest and principal of loans; and except dues of sinking fund and interest on school fund loaned to railroad companies.

"Sec. 3. Treasury notes and coupons issued by the Confederate States of America shall be receivable as money for indebtedness to the State, for indebtedness to the State lands under the pre-emption laws and laws authorizing the sale of the University lands, and laws providing for the sale of the public domain in general, including certificates therefor; for office fees, including fees for patents of land, dues payable in the general land office, taxes, and all other dues to be collected for the State or any debts claimed, except specific taxes for the object of paying principal and interest of loans, and except dues of sinking fund and interest on the school fund loaned to railroad companies; and shall be receivable for taxes to be collected for the ordinary revenues of counties, without affecting their special taxes.

"Sec. 4. This act shall be in force from and after its passage."

Approved January 11, 1862. *Acts of 1862, p. 37.*

The Act last quoted made a specific provision that the non-interest bearing treasury warrants should be used for the payment of practically all indebtedness, except specific taxes levied for the purpose of paying interest and principal of loans and except sinking fund and interest on school fund loaned to railroad companies. The interest bearing warrants were not to be received for that purpose, the supposition being that there were few of them in existence, therefore, there was no necessity for making such provision, because the act authorizing the issuance of non-interest bearing warrants presupposed that the interest bearing ones would be funded in the non-interest bearing warrants. In fact, specific provision was made for their being refunded in the non-interest bearing warrants. *(See Section 2 of the Act approved January 10th, 1862.)* It seems, therefore, too clear for argument that the warrants fundable in eight per cent. bonds were issued under and by virtue of the Act of 1862. They certainly were not issued earlier than that date, because if they had been they would have been paid on presentation to the treasurer early in 1862, and if not paid would have been refunded according to the provisions of section 2 of the Act of 1862 in non-interest bearing warrants.

In 1863 the Legislature sought to give a wide field of usefulness to these warrants. In December, 1863, they passed an act, which reads as follows:

"Be it enacted by the Legislature of the State of Texas: That the comptroller of the State be and he is hereby authorized to receive from the railroad companies of this State who are indebted to the special school fund,

all interest on their bonds that may be now or hereafter become due, provided same be tendered in said bonds, or State warrants previous to the meeting of the next regular session of the State Legislature." (See Acts of the Texas Legislature, 1863, p. 37.)

On November 15th, 1864, another act was passed which reads as follows:

"That the railroad companies of this State that are indebted to the special school fund shall continue to be allowed the privilege of paying the interest due the said fund in the treasury warrants and bonds and coupons of the State; and may also discharge the whole or any part of the principal of their indebtedness to that fund in the same manner. Provided, said railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par with specie, for freight and passenger travel. That all treasury warrants and bonds and coupons of the State so received into the State treasury shall be cancelled, and the comptroller shall issue the bonds of the State, *bearing six per cent interest*, to the special school fund for the amount so paid in, and this act take effect from and after its passage."

Approved November 15th, 1864. *(Acts of 1864, p. 14.)*

The Act last quoted gives the court the necessary information as to the existence of the 6 per cent. bonds and of the act authorizing State warrants to be funded in the 6 per cent. bonds. This court, by an inspection of these acts, will know that those warrants with which the interest was paid under the previous acts were fundable in 8 per cent. bonds, and that all warrants received after November 15th, 1864, in payment either of the interest or principal, should be fundable in 6 per cent. bonds, hence the payments made in December and in the early spring of 1865 were fundable in six per cent. bonds.

The finding of fact by the Court of Civil Appeals to the effect that these warrants were issued after January, 1862, is abundantly supported by the evidence.

SIXTH COUNTER-PROPOSITION OF DEFENDANT IN ERROR.

The treasury warrants in which the payments were made were issued for the purpose of being circulated as money, and were, therefore void, because issued in violation of Article 8, Section VII, of the State Constitution, as it then existed.

STATEMENT.

The section of the State Constitution in question reads as follows:

"Sec. 8. No money shall be drawn from the treasury but in pursuance of a

appropriation made by law, nor shall any appropriation of money be made for a longer term than two years except for purposes of education; and no appropriation for private or individual purposes, or for purposes of internal improvement, shall be made without the concurrence of two-thirds of both houses of the legislature. A regular statement and account of the receipts and expenditures of all public moneys shall be published annually in such manner as shall be prescribed by law, *and in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money.*

It will be noted that the above proposition involves a finding of fact as well as a legal conclusion. If considered from one standpoint it involves a finding of fact, though from another, involves only a legal conclusion. As a matter of law I insist that the conclusion stated to the effect that these warrants in question were issued for the purpose of being circulated as money, is established by the acts of the Legislature alone.

In this connection it is necessary to recur to the act of 1860, which authorized interest bearing treasury warrants to be issued. The last sentence in section 2 of that act is in these words, "*Said warrants shall not circulate as money, but may be assigned.*" It is plain, therefore, that the act of 1860 authorizing the interest bearing warrants to be issued prohibited their being circulated as money. The act of 1862 repealed the Act of 1860. The Act of 1862 is conspicuous by the fact that the inhibition against the use of warrants as money was omitted therefrom. It furthermore provided that the warrants should not be issued for the amount of indebtedness like government warrants are ordinarily issued, but that they should be of such portions of the claim as may be expressly required by the holder; provided, that not more than one-tenth of the whole amount may be warrants of one dollar each and the balance of five dollars or more each. The denomination of these warrants is quite suspicious. Neither the Federal nor State governments draw warrants of that character to meet the salary lists of the officials or employes or to pay any other indebtedness. A warrant drawn to subserve the ordinary governmental purpose would be for the amount of indebtedness, but here the holder was authorized to take ten per cent. of the whole amount of his indebtedness in warrants of one dollar each and the balance in warrants of five dollars each. The holder of the claim could dictate the denomination of the warrants. There must have been some purpose in this, besides giving to the holder the evidence of the fact that the State was indebted to him.

On the following day the Legislature passed another act, which was entitled "An act declaring what kind of bonds may be received for certain public dues," and reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That all specific taxes for the objects of paying interest and principal of loans shall be collected in specie currency.

"Sec. 2. Treasury warrants, not bearing interest (in addition to the provision heretofore made for their reception in payment for lands, including certificates therefor), shall be receivable *as money* in the payment of office fees, including fees for patents and land dues payable in the general land office, taxes, and all other dues to be collected for the State, or in its name, except specific taxes for the objects of paying interest on school funds loaned to railroad companies."

On the same day the same Legislature passed another act in these words:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the treasurer, and every other officer of the State, and every officer of counties, who, according to law, shall have received, as public money, treasury warrants of this State, or treasury notes of the Confederate States of America, or its coupons, shall disburse or transfer the same *as money*, at par, according to the laws providing for the disbursement or transfer of money, in the respective cases, if the person or persons entitled to have a disbursement or transfer will receive such warrants, notes and coupons as money; and officers who may be authorized to receive public money, are authorized and directed to receive such warrants, notes and coupons *as money*, except when expressly prohibited by some other law; and any officer, in making such disbursement and transfer, may adjust the balance by receiving a fractional part of the amount of any such warrant, note or coupon, in any of such funds or specie currency, in whole or in part, to be held and applied as that for which it was received, except that treasury warrants of the State, received by the treasurer thereof, shall not be re-issued. Every public receiver of such warrants, notes and coupons, on reception thereof in each case, shall give a receipt, officially subscribed, specifying the kind and amount, respectively, of the funds received; and shall keep a corresponding account showing the several kinds and amounts received, and from whom, and shall be accountable in kind, with the qualification aforesaid, for whatever he may have thus received, or, in default thereof, for the same amount of specie currency. *Any such receiver, in failing to comply with any of the foregoing requisitions, shall be deemed guilty of a misdemeanor, and on conviction thereof, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one month, or by both fine and imprisonment as aforesaid, and may be removed from office by judgment of the court trying the case.*

"Sec. 2. This act shall be in force from its passage." (Acts of 1862, page 38.)

On the 13th day of January, 1862, another act was passed making an appropriation of $75,000 for mileage and per diem of the 9th Legislature of the State of Texas. Section 1 provides for the issu-

ance of treasury warrants therefor. Section 3 of the act is in the following language:

"Sec. 3. That in case there be no fund in the treasury, the comptroller shall draw his warrant upon the treasurer; said warrants shall be receivable for taxes and other public dues, as may be provided by general law; one-tenth of each claim may be issued, if the claimant so desire it, in one dollar warrants. For the other nine-tenths of the claim, no warrant shall be drawn of a less denomination than five dollars." (Acts of 1862, p. 55.)

On the 5th of March, 1863, the Legislature made an appropriation in the following language:

"Section 1. Be it enacted by the Legislature of the State of Texas: That the sum of six hundred thousand dollars is hereby appropriated to be distributed by the comptroller according to such regulations as he shall adopt, to the county courts of each county in the State, according to the scholastic returns and estimates for the years 1861 and 1862, taking as a basis for the distribution to those counties which have not returned their list for both years, a year for which there is a return of the county, to be administered by said county courts for the support and assistance of the widows, families and dependents of the officers and soldiers of Texans who have been or may be in the army of the Confederate States or in the active military service of the State of Texas, and which widows, families and dependents may need the support and assistance of the State." (Acts of 1863, page 13.)

On December 16th, 1863, the Legislature passed an act, among other things, providing for the taxation of money and notes. Section 2 of the act in question reads as follows:

"A tax of one-half of one per cent. shall be levied and collected in kind on all specie, treasury notes of the Confederate States of America, treasury warrants of the State of Texas and bank notes held or owned in this State and all foreign bills of exchange and certificates of deposit and other evidences of money upon deposit or secured beyond the limits of the State, owned by persons residing therein shall be known as specie and thereon shall be levied a tax of one-half of one per cent. in specie." (Acts Tex. Leg. 1863, p. 38.)

A proper construction of these several acts of the Legislature above quoted makes clear the intention of the Legislature to issue these warrants for the purpose of being circulated as money. The points so clearly shown are as follows:

1. The Act of 1860 prohibited the interest bearing warrants thereby authorized to be issued from being used as money.

2. The Act of 1862 repealing the Act of 1860, authorized the issuance of non-interest bearing warrants, but contained no prohibition against their use as money.

The denomination of the old warrant was to be fixed by the amount of indebtedness due.

The denomination of the new warrants depended in part upon the will of the holder of the claim, he being allowed to put ten per cent. of them in one dollar warrants and the remainder in warrants of five dollars each. These even numbers indicate most conclusively that they were to be used for some purpose other than as an evidence that the State was indebted to the holders thereof. The denominations indicated also, that they were for general circulation. To make clear this fact, an examination of the record only is necessary, so that the size, shape, and general appearance of these warrants may be noted. (R. .) These new warrants were not to bear interest. By an act of the same day heretofore quoted, they were made receivable for almost every kind of public dues that could be mentioned, with one or two exceptions.

The act passed by the Legislature on the following day provided that these treasury warrants should not only be received in payment of certain public debts, *but they should be received as money.*

By an act of the same day, to-wit, January 11th, 1862, State officers were required to *disburse them as money.* It required them to be treated by the officers as money. A failure so to do made the officers liable to a fine of not exceeding one thousand dollars, or by imprisonment not exceeding one month, or by both fine and imprisonment, and beside that they might be removed from office.

Later on they were made receivable for the interest on the special school fund, and still later were made receivable in payment of the principal.

Taking all these acts together no one can fail to observe that the intention of the Legislature was to furnish the country with a character of currency which was to take the place of the ordinary circulating medium, to be used for all purposes for which money could be possibly used.

This contention is strengthened by the fact that the comptroller, the accounting officer, for the fiscal years 1860 and 1861, recommended this character of financial legislation. This may be found on pages 108 and 109 of his report. He was then undertaking to outline a plan whereby the State could have a volume of currency sufficient to transact its business. On this point he said:

"There being no prospect of replenishing the treasury by a sale of State bonds,

and as the taxes of the present year will not be available before the middle of next September, it becomes highly necessary to provide means for the support of the government until that time. To thus provide and establish the par value of treasury warrants are objects worthy of the first and highest consideration.

"The entire accomplishment of these important objects would certainly result from the plan already proposed—provided only that treasury warrants be made receivable for taxes and all public dues.

"The fact that the proposed revenue will far exceed the amount of warrants to be issued will make the demand for warrants greater than the supply and render them equivalent to specie, thereby affording to the government ample means for present support, and to the people great facilities for the payment of taxes during the war, and the consequent scarcity of specie.

"No embarrassment or inconvenience can possibly result from the policy of making treasury warrants receivable for public dues; provided only that the issue of warrants is limited to the amount of revenue required which may be controlled by the legislature in making appropriations for that purpose.

"A treasury warrant is simply an order on the State treasurer to pay to the order of the party a certain amount audited in his favor.

"Should the State treasurer have no funds for the payment of warrants, an act of the legislature making them receivable for public dues, is in effect, only to authorize such other financial agent of the State as may have means to redeem the same.

"The issue of warrants, or audited scrip, may at times become necessary to meet extraordinary emergencies, or to avoid this necessity, a safety fund should be provided and retained in the treasury sufficient to meet such demands, which, indeed, would be less objectionable than to resort either to the uncertain means of borrowing money, or to the issue of warrants or scrip of any kind; yet it can not be denied that the commercial habits and necessities of the country, and the progressive and enterprising disposition of the government and people sometimes demand the use of credit in place of coin as an irresistible public necessity.

"Under no circumstances should anything but specie or audited drafts of the State treasury be made receivable for public dues. To make any other description of paper receivable for State dues to be again issued, would not only be obnoxious to law, but highly detrimental to the credit of the State.

The State being in debt, her own liabilities should be preferred to all others, and after the State debt has been paid by the issue and redemption of warrants as proposed, the revenue for the ordinary support of the government should forever be collected in specie. Should it be found necessary to continue the issue of treasury warrants, and should such measures be adopted as will preserve the par value of the same, it will be quite unnecessary to continue the issue of interest warrants, since it is manifest that the interest adds but little to the value of such issues.

"This is the only practicable method known to this office under existing circumstances by which the good faith and credit of the State may be preserved, the public debt promptly paid and available means furnished to meet the present necessities of the government." Rec. p. .)

It will be seen that the scheme outlined by the Comptroller to make the State warrants, or audited warrants, receivable for all

public dues, was adopted by the Legislature. No fiatist ever dreamed of a more perfect system than that outlined by the Comptroller. The Governor of the State adopted this view, and impressed it upon the Legislature. (R.,) That portion of his message in which he deals with this subject reads as follows:

"I consider that experience has established that treasury warrants, at the present time, can only be kept up at a just appreciation, by creating for them a general and constant demand approximating to the amount issued. The 8 per cent. bonds now outstanding on which the interest has been regularly paid, except for a short period since the first of July last, are rated in the market at 25 cents on the dollar, or less, and yet the law has been observed in discharging the interest upon them. There is much more certainty both as the proportion which the specie interest bears to the amount of these bonds, and as to the regularity of its payment than is given to the public mind in the law referred to, as to the amount of specie to be used, and the periods when to be used, in the purchase of these warrants. It follows then, that if these issues from the treasury are to be made in the future, and the credit of the State preserved, that a plan must be devised which will create for them a constant and general demand, approximating to the amount issued." (R. p. .)

Thus it will be seen that the State court correctly held that these treasury warrants were issued for the purpose of being circulated as money. The recommendations of the Comptroller, the message of the Governor, the acts of the Legislature, the form, size and denomination of the warrants, all show, and conclusively show, that these warrants were issued for that purpose. They were made fundable in State bonds for the purpose of maintaining them. By funding the warrants in bonds and paying the interest promptly, it was supposed they would be taken in all the channels of trade. But Gov. Murrah called attention in his message to fact that they had been somewhat disappointed in results, and that some other and increased use should be made for these warrants in addition to those theretofore advised. What were these increased uses? That they should be used by the railroad companies in paying the interest and principal of the large debt which they owed the State, as the Act of 1864 subsequently provided. It was supposed by the railroads agreeing to take them at par for their railroad and passenger fares it would create a larger demand for them, though there is nothing in the record to indicate that they kept that part of their contract. It is as clear as it is possible to make any question, that the entire system of legislation was for the purpose of constituting the warrants in question a circulating medium, which would answer all the purposes of money. This is just what the State Constitution said

the Legislature had no power to do. The fact that the Comptroller and the Governor recommended the legislation, could not change the Constitution. They were as much hedged in by the limitations of the organic law as the Legislature. This court has held that an invalid act of the Legislature is as inoperative as if never passed. *(Morton vs. Shelby County, 18 U. S., 426.)* Applying that rule, the conclusion cannot be avoided that these warrants issued in open defiance of the prohibitions of the State Constitution, must be held invalid, and, therefore, as never having been issued. If legally considered, it must be held that they were never issued, that is to say, that no legal warrants were ever issued; it must likewise follow that no warrants were ever paid the State of Texas on this indebtedness.

It is plain, therefore, that if this court feels at liberty to examine the facts upon which the conclusions of the State court were based, that it cannot say that the findings were unsupported by the evidence. It will be noted that they are supported by the authorities.

Bragg vs. Tuffts, 6 S. W. Rep., 163.
Dively vs. The City of Cedar Falls, 21 Iowa.

*In the case last cited the court held that the paper in question was not issued for the purpose of being circulated as money, but they added, "It is clear * * * if the obligations sued on in this case were issued for the purpose of being used and circulated as money in violation of the statute they were void and could not be the basis of a recovery."* The following cases support the same proposition:

Thomas vs. The City of Richmond, 12 Wall., 349-357.
City National Bank vs. McMahon, 21 La., 751.

That the warrants in question were issued to circulate as money cannot be doubted. If the State court had decided that they were bills of credit and void because violative of the Federal Constitution the decision would have been clearly correct. The general proposition is correctly stated in the *American and English Encyclopedia of Law, Volume 16, page 709*, in the following language:

"Certificates issued by a State receivable in payment for taxes, for fees, for salary of officers, etc., for the redemption of which the faith of the State is pledged are bills of credit within the meaning of the Constitution, although they are not made legal tender by State law."

Or, as this court has stated it:

"The term 'bill of credit' has acquired an appropriate meaning. Bills of credit signify a paper medium intended to circulate between individuals and between the government and individuals for the ordinary purposes of society * * * If the prohibition means anything; if the words are not empty sounds it must comprehend the emission of any paper medium by the State government for the purpose of common circulation." (*Craig vs. Missouri, 4 Pet., 123.*)

Another definition given by this court is as follows:

"The definition including all classes of bills of credit emitted by the colonies or State, is a paper issued by the sovereign power containing an obligation of its faith, and designed to circulate as money." (*Briscoe vs. Bank of Kentucky 11 Pet., 257.*)

Or as subsequently held by this court:

"To constitute a bill of credit within the meaning of the Constitution it must be issued by the State on the faith of the State and designed to circulate as money and must be a paper which circulates on the credit of the State and is so received and used in the ordinary business of life." (*Darrington vs. Bank of Alabama, 13 How., 12.*)

The principles above quoted were applied by this court to the case of *Poindexter vs. Greenhow, 114 U. S., 270.* They were in no sense modified, but held not to be applicable to the coupons there under consideration. But why? Because the court said:

"They (meaning coupons) are promises to pay money. Their payment and redemption is based upon the credit of the State, but they are not emitted by the State in the sense in which a government emits its treasury notes, or a bank its bank notes as a circulating medium or currency as a substitute for money."

And the court added:

"There was nothing on the face of the instrument, nor in the form, nor in the terms of the law which authorizes the issue, nor in the circumstance of creation or use as shown by the record on which to found an inference that these coupons were designed to circulate in common transactions of business as money, nor in the fact that they were so used. The only feature relied on to show such design is that they were made receivable to pay taxes and other dues to the State."

On the following page, in the same case, the court adds this language:

"From this it is argued that they obtained such a circulation from hand to hand as money as the demand for them based upon such quality would naturally give. But this falls far short of their fitness for general circulation in

the community as a representative and substitute for money, in the common transactions of business, which is necessary to bring them within the constitutional prohibition against bills of credit. * * * In this case the coupons were issued by the State of Virginia and in its name and were obligations based upon its credit, and which it had agreed, as one mode of redemption, to receive in payment of all dues to itself, in the hands of any holder; but they were not issued *as and for money*, nor was this quality impressed upon them to fit them for use as money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the State treasury and the tax payers. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all."

So it will be seen that the case of *Poindexter vs. Greenhow* does not militate against the former decisions of this court, but the principles previously enunciated and reiterated in the case last mentioned were not applicable to the facts therein stated, in that this court determined that the coupons of the Virginia bonds were not issued for *the purpose of being circulated as money*. But the warrants involved in this case were issued for that purpose. The court so found, and it is respectfully submitted that the facts shown in the record abundantly support that finding. Having been issued as money they are, therefore, void, and if the State court had held they were issued in violation of the Federal Constitution alone, without reference to the State Constitution it is submitted that under the operation of the rules many times announced by this court the judgment of the State court would be approved and its decision affirmed.

Similar litigation was had in the State of Mississippi, as will be seen from the case of *New Orleans Railroad Company vs. The State*, *57 Miss., 877*; also *Thomas vs. Taylor*, *42 Miss., 651*; and *Thomas vs. Taylor*, *22 Wall., 479*. In the Mississippi cases, however, the defense seems to have been based upon the fact that the legislation therein involved was passed, and the paper issued thereunder was issued in aid of the rebellion. The State trial court based its decision in this case, in part at least, upon this proposition. The Court of Civil Appeals, to which the writ of error in this case is directed, based its decision upon the fact that the paper was issued in violation of the State Constitution and was, therefore, void. The record, however, will abundantly support each finding. No one can

examine the legislation for the particular period of Texas history and reach a conclusion, other than it was had to aid the State in the prosecution of the war between the States. That being true, it would furnish additional ground, if this court should take jurisdiction, for sustaining the court below. But it is unnecessary to elaborate this point as it is not believed to be necessarily involved in this discussion. It was insisted in the State court, and will doubtless be in this, that this was an executed contract; that is to say, that the paper was issued by the State, put in circulation, and paid by the railroad company back to the State; and, that being an executed contract this court will not interfere with it. With all due respect to the learned counsel on the other side, it must occur to any one that that is an absurdity. Who were the parties to the proposed contract said to be executed and not executory? Manifestly the State and the railroad company. The first question that necessarily arises is, did the *State* make such a contract with the railroad company? Did the *State* agree to issue warrants and agree to accept those warrants in payment of its indebtedness? How can the *State* be said to have made a contract, when by the express terms of its Constitution, it prohibited the issuance of such warrants? Does it not necessarily follow that it prohibited its State officers from accepting such warrants in payment of that or any other indebtedness? When the State prohibited the issuance of a certain character of paper intended to be circulated as money it must be presupposed that its officers would obey the constitutional prohibition. It must therefore follow, as night follows day, that if the officers obeyed the constitutional prohibition there would be no such paper to be received in payment of any debt, and therefore, it was at least, impliedly prohibited from being accepted, as the Constitution forbade the issuance of the paper. The act of the Legislature was absolutely void. The Legislature was but an agent of the State. Having been forbidden by the State, its principal, from issuing this particular kind of paper, and necessarily being forbidden from accepting such paper, because it was not supposed to exist, if the officers did issue such paper and accept it, neither their unauthorized issuance nor acceptance was the act of the State, but was an act which the State had actually prohibited. The principle is recognized that the action of an agent is the act of the principal, provided, it has been authorized by the principal; but no court has ever

held that an act of an agent, not done in pursuance of his authority, but in open violation of the limitations imposed upon that authority by the principal, bound the principal, particularly when the limitations of the agent's authority were known to those with whom he dealt. The constitutional prohibition was a public law. The railroad companies must be chargeable with notice of it; they are presumed to have known the law, therefore, when they dealt with the Legislature with respect to these matters, they dealt with that body knowing that it had no authority to issue treasury warrants to be circulated as money, or to accept those treasury warrants, the issuance of which was prohibited, in payment of a debt, because their issuance had been prohibited. It would be singular if a constitutional provision could be nullified in this way, that is to say, the people of a State in their organic capacity, in a constitutional convention, may prohibit the performance of a given act, and yet the Legislature would authorize the doing of this prohibited act; the officers of the State would execute the act of the Legislature, and then the courts would hold, that being an executed act, it was binding upon all parties, and in that way the Legislature becomes more powerful than the people, whose agents they are. They can nullify the acts of constitutional conventions by passing laws contrary to the Constitution, and having those laws executed before any controversy can arise in reference thereto. But, independent of this proposition, it is well settled, that without special authority an agent can only receive payment of the debt due his principal in legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. The testimony as to these treasury warrants, by ex-Governor Lubbock, is that they were not worth more than ten cents on the dollar at the time the payments were made; that he sold his warrants representing his salary for about that sum. *(Ward vs. Smith, 7 Wall., 447-450; Morgan vs. Ball, 43 Miss., 288-292.)*

This argument also applies to the suggestion made in the State court, which will doubtless be made here, that these payments were ratified by the State Legislature in 1870. Yet, the Legislature of 1870, had no authority to issue treasury warrants for the purpose of being circulated as money. The latter part of Section 6, Article XII, of the Constitution of 1869, uses this language:

"In no case shall the Legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." *(Sayles' Tex. Stats., Vol. 4, p. 447.)*

It has already been shown that the Legislature had no authority when the treasury warrants in question were issued and received in the payment of this debt, to issue them. The Legislature of 1870 was hedged about by the same character of limitation. It had no authority to authorize treasury warrants to be issued for the purpose of being circulated as money. It is a familiar principle that one cannot ratify that which he could not originally authorize. Or to state it more broadly, one cannot ratify an act which he did not have the power to authorize, at the date of the attempted ratification. The Legislature, at the date of this proposed ratification in 1870, had no authority to authorize the act to be done. Not having the power to authorize the act to be done, certainly they could not approve it after it was done, and in that way give it vitality. It is equally as familiar to the legal mind that a void act is incapable of ratification by any one. An act of the Legislature passed in plain violation of a constitutional prohibition is certainly void. There can be no dispute about that. That act cannot be ratified, and it must, therefore, follow that the acts of the Texas Legislature authorizing the issuance of treasury warrants for the purpose of being circulated as money, and of other acts based on these void acts authorizing the officers to receive them in payment of debts, were likewise void and incapable of ratification by the Legislature. It is doubtful whether even a constitutional convention could ratify them, but certainly a Legislature could not.

The contention of counsel for plaintiff in error involves this absurdity that one Legislature being an agent of Texas could exceed its authority, commit an act in open violation of one of the plainest prohibitions of its Constitution, and then another Legislature some years later, hedged about by the same limitation, with no authority in excess of that with which the former Legislature was clothed, can ratify, approve and make valid the acts of the former Legislature, committed in violation of the Constitution. But reasoning on this subject is unnecessary. The Constitution of 1869 positively prohibited such ratification. Section 34 or Article XII, in so far as applicable, reads as follows:

"All debts created by the so-called State of Texas from and after the 28th day of January, 1861, and prior to the 5th day of August, 1865, were and are

null and void and the Legislature is prohibited from making any provision for the acknowledgment or payment of such debts." (*Sayles' Texas Statutes, Vol. 4, p. 465.*)

It would be impossible for the Legislature to have accepted the payment previously made in the treasury warrants issued after the 28th day of January, 1861, without acknowledging the existence of the indebtedness created during that period. The warrants represented indebtedness created not only after the 28th day of January, 1861, but after the 10th day of February, 1862. To the extent, therefore, that any legislation recognized a payment previously made, in warrants evidencing indebtedness created after 1862, even if otherwise valid, it was necessarily void. This view was taken of the question by the officers of Texas immediately after the war and the payments made in warrants were repudiated, and during Gov. Davis' administration, which was the last Republican administration, they were not admitted by either himself, or his Comptroller of Public Accounts. They have remained a charge against the railroad company on the books of the State through all the successive administrations. In other words, the invalidity of the payments have been shown to be insisted on by the State officers ever since. Recognizing these facts, the railroads have made all their payments, as the record will disclose, under protest. (R., pp.)

It is not believed necessary to discuss any other questions suggested by the record, for the reason that it is not thought they can be considered by this court. By way of recapitulation, therefore, it is suggested:

1. The real issue involved in the trial court was the validity of certain payments made in treasury warrants issued during the war between the States. The Court of Civil Appeals, to which the writ of error in this case is directed, held that those payments were invalid, and that the issuance of the particular paper in which the payments were made, was prohibited by the State Constitution, and that the officers issuing same, and accepting same in payment of the debt, acted outside the limitations of their authority, and that their acts were, therefore, void and not binding upon the State.

2. That inasmuch as the State court rested its decision wholly on the finding of fact and on the construction of the State Constitution, that this court is without jurisdiction; and that, therefore, the writ of error ought to be dismissed.

3. That while the finding of facts by the State court and the construction of the State Constitution by that court is believed to be conclusive on this court; yet if this court shall hold otherwise it is submitted that the record in this case discloses that the finding of fact, to-wit, that the warrants were issued during the war and after February, 1862, and for the purpose of being circulated as money, is abundantly sustained by the evidence, and that indeed no other conclusion could have been justly reached by the State court.

4. That even if the State court had based its decision in whole or in part upon the proposition that the warrants in question were bills of credit and were therefore void, because issued in contravention of the Federal Constitution, that its decision must be sustained under the authorities heretofore cited.

5. That inasmuch as the State Constitution forbade the issuance of the warrants in which these particular payments were made, that it impliedly forbade the acceptance of same, because it is impossible to conceive of a State officer being authorized to accept in payment of a debt paper which the State officers were prohibited from issuing, and that, therefore, neither the issuance nor acceptance of said paper was binding upon the State in any legal sense whatever.

6. That inasmuch as the issuance of the paper was void and the acceptance void, the void act was incapable of ratification by some subsequent Legislature which was but an agent of the State and clothed with no greater authority than those which attempted to authorize the issuance of these particular warrants. In other words, that one agent cannot ratify the unauthorized act of a previous agent, but if ratified at all it must be by the principal, and that it is not shown in this case that the principal, that is, the State of Texas, undertook to ratify in any sense the unauthorized act of its agent, because the Constitution of 1869, under which the Legislature of 1870 was operating, specially forbade the recognition or acknowledgment of any debts created after January 28th, 1861, and that inasmuch as these warrants were issued after February, 1862, it must follow that they were issued as representing indebtedness created after 1861, and, therefore, any attempted acknowledgment of their justness was forbidden by the positive terms of the Constitution of 1869.

7. That no agent is authorized to accept in payment of any indebtedness anything other than money which passes current at par.

and it is shown in the record in this case that these warrants at the date they were received in payment of this indebtedness were worth not more than ten cents on the dollar, therefore, in no sense, could the indebtedness be held as canceled or liquidated by the unauthorized acts of these agents in receiving paper which passed at less than par. *(Ward vs. Smith, 7 Wall., 447.)*

8. That the payments made in these treasury warrants were immediately repudiated by the State Officers, as is shown by the record in this case, and that this repudiation of these payments has been concurred in by every State administration since said date, covering a period of more than a quarter of a century.

9. That the payments made by the railroad companies recognize the fact of this repudiation in protesting against the application of any of their payments to the interest on the indebtedness which they claim had been previously paid by said warrants.

In this connection, it should be stated that it has been impossible to quote the pages of the record, for the reason that the plaintiffs in error have not had the record printed, but it is not believed that any statement made herein will be controverted by counsel for the plaintiffs in error. It is, therefore, respectfully submitted that the motion to dismiss the writ of error already on file should be granted, and if not, the case should in all things be affirmed.

M. M. CRANE, Attorney-General,
Attorney for Defendant in Error.

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No. 306 81

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Filed Apr. 15, 1899.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 306.

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, *Plaintiff in Error.*

vs.

THE STATE OF TEXAS, *Defendant in Error.*

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

ADDITIONAL BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

T. S. SMITH, Attorney-General of Texas.
C. A. CULBERSON,
Counsel for Defendant in Error.

PRESS OF JOHN F. WORLEY, DALLAS.

IN THE

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vs.

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IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

ADDITIONAL BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF THE CASE.

On December 8th, 1894, the Attorney-General of Texas instituted this suit in the District Court of Travis County, Texas, in the name of the State of Texas against the plaintiff in error. It was a simple action of debt and to foreclose a lien on the railroad property to secure loans made by the State to the company under an act of the legislature of said State approved August 13th, 1856.

There was not the most remote suggestion of a Federal question in the original petition. (Record, pp. 1 to 5).

The defendant company filed a voluminous answer, in substance pleading, (1) part payment of interest and sinking fund in lawful money, and (2) payment of the balance in warrants and treasury notes of the State of Texas issued after the secession ordinance was passed and which said payment in warrants and treasury notes was authorized by several acts of the legislature enacted between 1861 and 1865. It was insisted in the answer that these several acts of the legislature, and the alleged to have been passed August 15th, 1870, constituted contracts between the State and the company which were within and entitled to the protection of Article I, Section 10, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts, and that to disallow payment under these statutes would deprive the company of its property without due process of law in violation of the fourteenth amendment. This answer, however, did not point out any law of the State of Texas, constitutional or statutory, under which it was sought to impair the obligation of the alleged contracts or which directly or indirectly was intended to have such effect or upon which such construction had been or could be placed. (Record pp. 5 to 24).

It also appeared from the answer (Record p. 9) that by an act approved January 11th, 1862, payment of all interest and the two per cent. sinking fund due on the loans to this company was extended until the 1st day of January, 1864, or until six months after the termination of the war between the United States and the Confederate

States, so that the alleged payment in warrants and treasury notes was purely voluntary.

Under the practice in Texas the replication of the plaintiff to the answer of defendant is termed the supplemental petition and contains no part of the statement of the cause of action. (47 Texas, 616, Rules 3, 4 and 5). So much of the first supplemental petition of plaintiff, the State of Texas, as bears upon this motion alleged that the pretended payment in warrants and treasury notes was illegal and void, because:

1. The said warrants and treasury notes were issued "in aid of the rebellion."

2. The company purchased said warrants and notes in the market for a nominal sum and sought to make payment with them at par.

3. The said warrants and notes were issued for the purpose of being circulated as money in violation of the Constitution of Texas.

4. The said warrants and notes were bills of credit and inhibited by Section 10, Article I, of the Constitution of the United States. (Record pp. 24 to 29).

The defendant company filed application and bond for the removal of the cause to the Circuit Court of the United States, alleging that the first supplemental petition of plaintiff, the State of Texas, in paragraph four referred to above, showed that the cause of action was one arising under the Constitution and laws of the United States, which application was denied. (Record pp. 29 to 38).

The subsequent pleadings of the plaintiff, the State of Texas, amplified the four grounds of defense to the alleged payment in warrants and notes contained in the

first supplemental petition and in addition insisted that if defendant company be allowed any credit for said pretended payments in warrants and notes it should not exceed the cash value thereof at the time they were delivered in so-called payment. (Record pp 38 to 43).

The defendant company, in reply, plead that the State having accepted the warrants and notes was estopped to question their validity and if they were in fact and in law void and issued "in aid of the rebellion" the State was *in pari delicto* and not entitled to relief. (Record pp. 43 to 49).

Judgment for the amount sued for was rendered for the State with foreclosure of the lien; the judgment was reformed and affirmed by the Court of Civil Appeals for the Third Supreme Judicial District; the Supreme Court of the State refused a writ of error, and upon application of plaintiff in error the Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District allowed a writ of error to review the judgment. (Record pp. 73, 217, 271, 314).

The defendant company admitted in effect the cause of action of plaintiff unless the alleged payment in warrants and notes was legal, (Record pp. 96, 101, 135), and besides the question of removal, practically the only question determined by the Court of Civil Appeals was that said warrants and notes in which payment was pretended to be made were intended to circulate as money and were therefore issued in contravention of Section 8, Article VII, of the State Constitution of 1845. Whether they were issued contrary to Section 10, Article I, of the Federal Constitution was not considered. (Record pp. 213,214).

Heretofore a motion to dismiss the writ of error was filed upon the ground that this Court is without jurisdiction. It is submitted that the motion to dismiss should be granted because, (1) the application to remove was properly denied, and (2) no question arising under the Constitution or laws of the United States is otherwise presented by the record.

First.

It is well settled that a cause is not now removable to the Federal Courts unless the Federal question appears from the plaintiff's statement of his own cause of action

Tennessee vs. Bank, 152 U. S., 454.
Hanrick vs. Hanrick, 153 U. S., 197.
Chappell vs. Waterworks, 155 U. S., 108.
Telegraph Co. vs. Alabama, 155 U. S., 487.
Land Co. vs. Brown, 155 U. S., 488.
R. R. Co. vs. Davidson, 157 U. S., 208.
U. S. vs. Tel. Co., 159 U. S., 553.
R. R. Co. vs. Skottowe, 162 U. S., 495.
Pratt vs. Gaslight Co., 168 U. S., 258.
R. R. Co. vs. Texas, 170, U. S. 236.

Counsel for plaintiff in error, while admitting the above rule and conceding that no Federal question appears from the original petition, insist that the allegation in the first supplemental petition that the warrants and treasury notes were bills of credit and were in contravention of Section 10 Article I of the Constitution of the United States takes the case out of this rule, but this court has quite recently held otherwise. Where "the petition stated

that defendants declined to pay on the ground that the law imposing the taxes was in violation of the Constitution of the United States," the cause was held not removable, and this case is clearly within the rule because the allegation upon which the removal is asked is not in the statement of plaintiff's cause of action, but in the replication to the defense of payment.

Sawyer vs. Kochersperger, 170 U. S., 303.

The same conclusion is reached if we look to the rules of pleading in Texas, which are fully presented on pages 14 and 15 of the original brief on this motion to dismiss.

Second.

No question arising under the Constitution or laws of the United States is otherwise presented by the record.

It will be remembered that the answer of defendant company sought to raise Federal questions: (1) by alleging that certain acts of the legislature of Texas passed between 1861 and 1865 authorizing the payment of interest and sinking fund on the loans to said company in State warrants and treasury notes, and ~~the~~ acts alleged to have been passed August 15, 1870, purporting in effect to ratify said payment, constituted contracts between the State and the company which were within and entitled to the protection of Article I, Section 10 of the Constitution of the United States to the effect that no State shall pass any law impairing the obligation of contracts; and (2) that to disregard the alleged payment in warrants and notes would deprive the company of its property without due process of law, in contravention of the fourteenth amendment to the Federal Constitution. (Record pp. 12, 13, 14,

20, 21.) When the case reached the Court of Civil Appeals *it was not assigned as error that the District Court refused to give effect to these contentions, in violation of these Constitutional provisions*, and consequently they were waived and abandoned. (Record pp. 191 to 203). It is true these contentions, after having been thus abandoned, were attempted to be renewed in the motion for a rehearing in the Court of Civil Appeals (Record p. 234) but they came too late.

Brown vs. Colorado, 106 U. S., 95.
Boom Co. vs. Boom Co., 110 U. S., 59.
Spies vs. Illinois, 123 U. S., 181.
R. R. Co. vs. R. R. Co., 137 U. S., 48.
Caldwell vs. Texas, 137 U. S., 698.

In abundance of caution, however, they will be traced through the record and fully considered.

In the petition for writ of error to the Court of Civil Appeals (Record p. 258) and in the motion for a rehearing thereon (Record pp. 281, 282) the two Federal questions are again presented. In the application for a writ of error to review the judgment in this Court there is a general averment in the language of Section 709, Revised Statutes of the United States (Record p. 295) and specific allegations (Record pp. 301, 302, 309, 310, 313) covering the same two Federal questions which appeared in the answer and other pleadings named. So much of the assignment of errors in this Court as affects the question is as follows:

"THIRD.

"The said Court of Civil Appeals erred in deciding against the validity of an authority exercised under the United States drawn in question in this cause.

"FOURTH.

"The said Court of Civil Appeals erred in deciding against the title, right, privilege, and immunity specially set up and claimed by said plaintiffs in error under the Constitution and statutes of and authority exercised under the United States.

"FIFTH.

"The said Court of Civil Appeals erred in deciding in favor of the validity of statutes of and authority exercised under the State of Texas drawn in question in this cause on the ground of their being repugnant to the Constitution and laws of the United States.

"SIXTH.

"The said Court of Civil Appeals erred in giving validity to the provisions of the Constitution of Texas adopted in 1869 and the Statute of Texas, approved August 13, 1870, drawn in question in this cause under a construction thereof, which impaired the obligation of the contract entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the provisions of the acts of the legislature of the State of Texas approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864.

"SEVENTH.

"The said Court of Civil Appeals erred in giving effect to the Constitution of Texas adopted in 1869 and the statute of Texas approved August 13, 1870, as impairing the obligation of the contract provision entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the acts of said State approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864.

"EIGHTH.

"The said Court of Civil Appeals erred in sustaining the validity of the authority exercised under the State of Texas by the Governor and Comptroller thereof in canceling and discharging credits for payments made under and in accordance with the provisions of the acts of the legislature of Texas approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, drawn in question in this cause on the ground of its being repugnant to the Constitution and laws of the United States.

"NINTH.

"The said Court of Civil Appeals erred in affirming the validity of the action of the State of Texas through the Governor and Comptroller in canceling and discharging credits given for payments made by the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and in accordance with the said acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, whereby said plain-

tiff in error was deprived of its property without due process of law, contrary to the Constitution of the United States.

"TENTH.

"The said Court of Civil Appeals erred in deciding in favor of the validity of the action of the State of Texas, which, if held valid, deprived said plaintiff in error of property without due process of law.

"ELEVENTH.

"The said Court of Civil Appeals erred in sustaining the action of the State of Texas in depriving said plaintiff in error of property, to-wit: valid treasury warrants issued under authority of said State of Texas, without due process of law by taking such private property for public uses without compensation therefor." (Record pp. 290, 291, 292).

Assuming, as we are authorized to do, that the Federal questions relied upon are those specified in this assignment of errors, they will be considered with some additional propositions.

1. The third, fourth, fifth and tenth grounds are too vague and indefinite for consideration.

Lawler vs. Walker, 14 How., 149.
Maxwell vs. Newbold, 18 How., 511.
Messenger vs. Mason, 10 Wall., 507.

2. The eleventh ground, besides being vague and indefinite, is without merit because the fifth amendment is restrictive of Federal authority only.

Withers vs. Buckley, 20 How., 84.

3. It is matter of astonishment that the sixth and seventh grounds should be presented. The plaintiff in error, in its answer, and as otherwise pointed out herein, insisted that it was authorized to make payments in warrants and notes under the acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864. It also insisted that this right was confirmed, not denied, by the acts alleged to have been passed August 15, 1870 (Rec. pp. 15 and 16). The Court of Civil Appeals held (Record pp. 213, 214) that the acts of 1861, 1863 and 1864, above mentioned, which authorized the issuance of warrants to circulate as money, were in violation of Section 8, Article VII of the State Constitution of 1845, which declared that "in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." The validity of these acts, tested by the Constitution of 1869, was neither considered nor decided by the Court. Nor was it held, as the assignment of errors assumes, that the acts of August 15, 1870, were in conflict with the acts of 1861, 1863 and 1864. In considering the contention of plaintiff in error that the acts of 1870 ratified the previous legislation the Court held that they could not be given that effect (Record p. 215) because the Constitution of 1869 contained a similar provision to the Constitution of 1845 against the issuance of warrants and notes intended to circulate as money. But

manifestly this does not raise a Federal question, inasmuch as legislation subsequent to the acts of 1861, 1863 and 1864 was not the basis of the judgment as to them, but as to these the basis was the Constitution of 1845, and as to the act of 1870 it was the Constitutions of 1866 and 1869.

Palmer vs. Marston, 14 Wall., 10.
Bacon vs. Texas, 163 U. S., 216.
Waterworks vs. Sugar Co., 125 U. S., 15.

4. It is evident that under the eighth and ninth grounds in the assignment of errors an effort is made to obscure and distort the proceedings in order to give this Court apparent jurisdiction. It should be a sufficient answer to the eighth ground that the Court of Civil Appeals did not sustain the authority exercised under the State of Texas by the Governor and Comptroller, but simply declared that the alleged payments were nullities (10 Wallace, 540); the Governor or Comptroller is not "an authority exercised under any State" within the meaning of Section 709 Revised Statutes (Bethell vs. Demaret, 10 Wallace, 537); and the Federal Constitution is not aimed at individual but State legislative action (Waterworks vs. Sugar Co., 125 U. S., 30); and to the ninth ground, that there has been and will be no deprivation of property except by the decree herein which is due process of law. But let us measure these grounds by Section 709, Revised Statutes of the United States, under which alone this Court can take jurisdiction, said section being as follows:

"A final judgment or decree in any suit in the highest Court of a State, in which a decision in the suit could be

had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Obviously jurisdiction does not attach under the first clause of this section as there was not drawn in question the validity of any treaty or statute of or authority exercised under the United States. Nor does the second clause give jurisdiction because while there was drawn in question a statute of and an authority exercised under the State of Texas, on the ground of their repugnance to the Constitution of the United States, namely, the acts of 1861, 1863 and 1864, yet no decision was rendered upon the point much less "in favor of their validity."

Bank vs. Griffith, 14 Pet., 56.
Walker vs. Taylor, 5 How., 64.

Is any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute or commission held or authority exercised under, the United States, which will give this Court jurisdiction under the third clause of this section? By the assignment of errors it is

attempted to bring the case within the fourteenth amendment by alleging that the clerical act of the Comptroller under the direction of the Governor in re-stating the account was a deprivation of property without due process of law, but manifestly this could have no such effect and cannot be taken seriously. Aside from this, beneath the thin disguise of the pleader, it is evident that no right, title, privilege or immunity under the Federal Constitution is claimed or can in good faith be claimed. The right to pay the debt in State warrants and notes, which is the only right in controversy, arises, if at all, under the laws of the State, and not under the Federal Constitution. This Court in determining its jurisdiction will look beyond the mere language of the pleadings to the real character and source of the right asserted.

R. R. Co. vs. California, 118 U. S., 113.

5. Stripped of mere verbiage the contention of plaintiff in error is that this Court has jurisdiction because the Court of Civil Appeals refused to give effect to the supposed contract or because its judgment in its effect impairs the obligation of such contract. It has been clearly shown that no Federal question was decided or was necessary to be decided; that the decision was based wholly upon the ground that the warrants and notes in which payment of the debt sued on purports to have been made were issued in violation of the State Constitution; that this is purely a question of State law; and under all the authorities this Court is without jurisdiction.

Knox vs. Bank, 12 Wall., 379.

Klinger vs. Missouri, 13 Wall., 263.

McManus vs. O'Sullivan, 91 U. S., 579.
Bolling vs. Lersner, 91 U. S., 594.
Crossley vs. New Orleans, 108 U. S., 105.
Waterworks vs. Sugar Co., 125 U. S., 30.
DeSassure vs. Gaillard, 127 U. S., 234.
Morley vs. R. R. Co., 146 U. S., 171.
Bacon vs. Texas, 163 U. S., 216.

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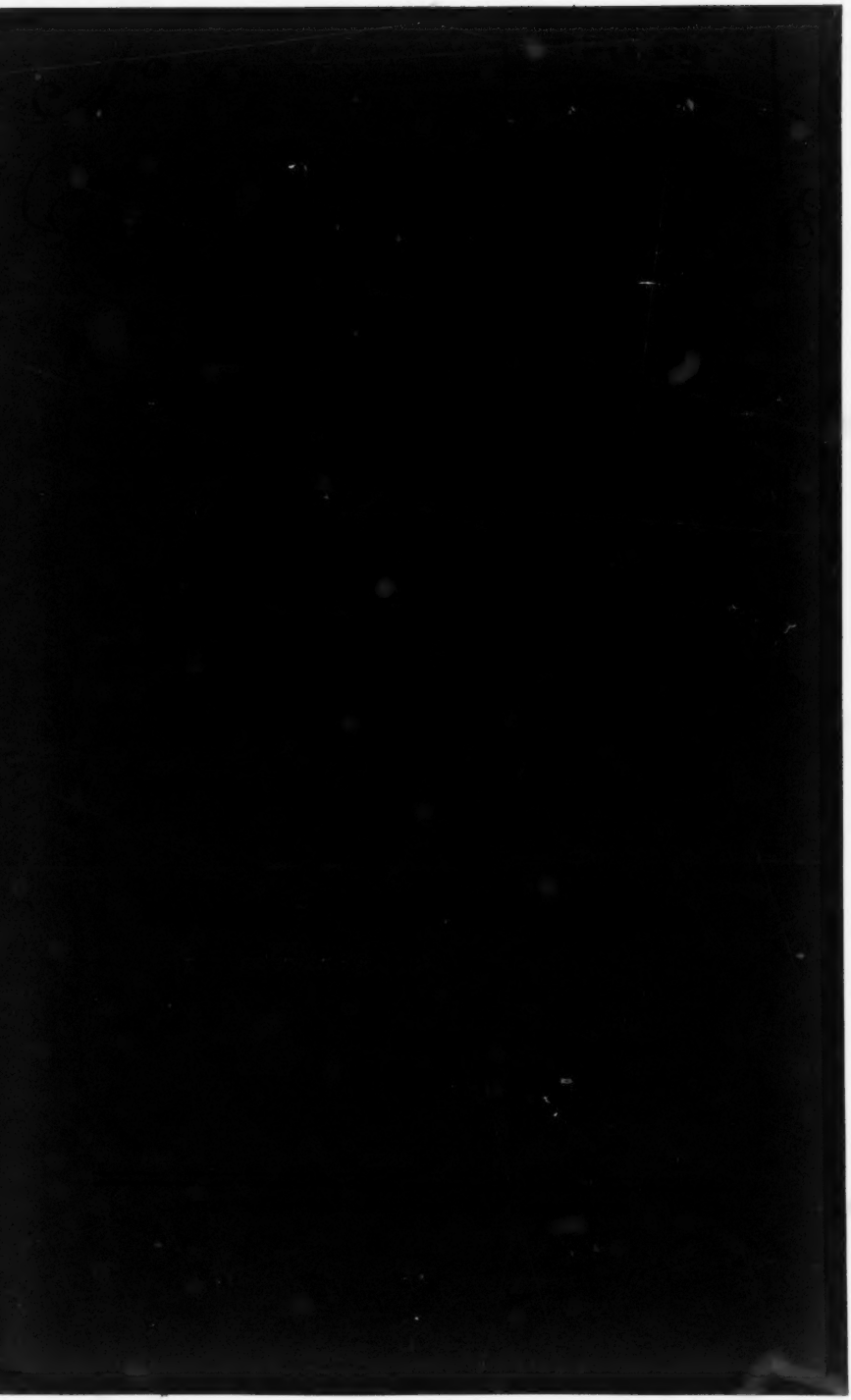

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 81.

THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

This is an action of debt and foreclosure by the State of Texas on bonds. Aside from the question of jurisdiction, the principal question involved is whether payments alleged to have been made by the plaintiff in error and the Washington County Railroad Company, which it succeeded, of certain interest and principal in treasury war-

rants issued by the State of Texas during the civil war, were valid and binding.

History of the Question.

By an act of the legislature of Texas approved January 31, 1854, $2,000,000 of the bonds received by the State from the United States in settlement of the boundary controversy of 1850 were set aside as a special school fund.

Gen. Laws Texas 1854, p. 17.

By an act of the legislature approved August 13, 1856, this special school fund was authorized to be loaned to railroad companies incorporated by the State. The loans were to be made by a board of school commissioners composed of the governor, comptroller, and attorney general, at the rate of $6,000 per mile of road, secured by bonds of the companies, bearing 6 per cent. interest, with 2 per cent. additional as sinking fund, payable to the State of Texas, which by said law constituted a lien upon the roads and charter rights of the companies, without the necessity of deeds or registration. The bonds, sinking fund of 2 per cent., and interest coupons were payable in dollars, meaning *lawful money of the United States.*

Gen. Laws Texas 1856, p. 31.

This act was amended August 26, 1856, and January 22, 1858, but in particulars not pertinent to this controversy.

The Galveston and Red River Railway Company was incorporated in 1848, and in 1856 its name was changed to the Houston and Texas Central Rail*way* Company. The Washington County Railroad Company was incorporated in 1856, and in 1870 it was consolidated with the Houston and Texas Central Rail*way* Company, the latter becoming liable for the debts of the former. In the meantime each of these companies had borrowed money from the State

under the act of August 13, 1856, referred to, the aggregate balance being that involved in this action. In 1886 all the property of the Houston and Texas Central Railway Company, including the property upon which the State has a lien to secure the loans mentioned, was sold under an order of court, and the purchaser formed under the general laws of Texas the corporation known as The Houston and Texas Central Railroad Company, plaintiff in error, and this company now owns and operates the railway property, including the road formerly owned by the Washington County Railroad Company.

By section 8, article 7, of the constitution of Texas of 1845, it was provided :

"And in no case shall the legislature have the power to issue treasury warrants, treasury notes or paper of any description intended to circulate as money."

Sayles' Constitutions, p. 208.

By section 14, article 1, of the constitution of 1845, it was provided that—

" No bill of attainder, *ex post facto* law, retroactive law, *or any law impairing the obligation of contracts*, shall be made."

Sayles' Constitutions, p. 187.

The Texas ordinance of secession was adopted February 1, 1861.

Sayles' Constitutions, p. 258.

By section 8, article 7, of the constitution of Texas of 1861, it was provided :

"And in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money."

Sayles' Constitutions, p. 245.

By section 14, article 1, of the constitution of 1861, it was provided that—

"No bill of attainder, *ex post facto* law, *retroactive law, or any law impairing the obligation of contracts*, shall be made."
Sayles' Constitutions, p. 227.

By the constitution of the Confederate States of America, ratified in Texas March 23, 1861 (Sayles' Constitutions, p. 274), it was provided by section 10, article 1:

"No State shall * * * make anything but gold and silver coin a tender in payment of debts * * * *pass any* * * * *law impairing the obligation of contracts.*"
Sayles' Constitutions, p. 288.

On February 14, 1860, an act of the legislature of Texas was approved authorizing unpaid warrants on the treasury to bear interest, and it was expressly provided that "said warrants shall not circulate as money, but may be assigned."
Gen. Laws Texas 1860, pp. 115, 116.

By an act of said legislature approved February 9, 1861, it was provided by section 1 "that the comptroller and treasurer shall receive treasury warrants *for money* in settlement with any individual indebted to the State for lands under the different pre-emption laws or laws authorizing the sale of university lands or laws providing for the sale of the public domain;" and by section 2 it was provided that "the board of school commissioners are hereby authorized to receive treasury warrants in payments of *the two per cent. for a sinking fund* payable by railroad companies in whose bonds the special school fund has been or may hereafter be invested."
Gen. Laws Texas 1861, p. 19.

An act approved January 10, 1862, expressly repealed the act approved February 14, 1860, above mentioned, and in

lieu thereof it was provided that warrants for legal claims should be drawn, if appropriations were made, and payment made if there was money in the treasury, "but if not, the comptroller shall issue one or more warrants for the amount that may be due, payable to the party entitled to payment, or bearer; and said warrants shall be of such proportions of the claim as may be expressly required by the holder, *provided* not more than one-tenth of the whole amount may be issued in warrants for one dollar each and the balance in warrants for five dollars or more each." The provision in the act of February 14, 1860, that "said warrants shall not circulate as money" was not re-enacted.

Gen. Laws Texas 1862, p. 34.

By an act approved January 11, 1862, it was provided "that the payment of all interest and the two per cent. sinking fund due and to become due on the bonds issued by the several railroad companies of the State of Texas for loans from the special school fund be and the same is hereby extended until the first day of January 1864 or until six months after the termination of the present war between the Confederate States and the United States of America, should it terminate before the time above named."

Gen. Laws Texas 1862, p. 37.

Another act approved January 11, 1862, provided that treasury warrants of the State not bearing interest and treasury notes and coupons of the Confederate States should be receivable "*as money*" for all obligations due the State except specific taxes for paying interest and principal of loans "and except dues of sinking fund and interest on school funds loaned to railroad companies."

Gen. Laws Texas 1862, p. 37.

On the same day, to wit, January 11, 1862, the legislature passed another act as follows:

"SECTION 1. *Be it enacted by the legislature of the State of Texas*, That the treasurer, and every other officer of the State, and every officer of counties, who, according to law, shall have received, as public money, treasury warrants of this State, or treasury notes of the Confederate States of America, or its coupons, shall disburse or transfer the same *as money*, at par, according to the laws providing for the disbursement or transfer of money, in the respective cases, if the person or persons entitled to have a disbursement or transfer will receive such warrants, notes and coupons as money; and officers who may be authorized to receive public money, are authorized and directed to receive such warrants, notes and coupons *as money*, except when expressly prohibited by some other law; and any officer, in making such disbursement and transfer, may adjust the balance by receiving a fractional part of the amount of any such warrant, note or coupon, in any of such funds or specie currency, in whole or in part, to be held and applied as that for which it was received, except that treasury warrants of the State, received by the treasurer thereof, shall not be reissued. Every public receiver of such warrants, notes and coupons, on reception thereof in each case, shall give a receipt, officially subscribed, specifying the kind and amount, respectively, of the funds received; and shall keep a corresponding account showing the several kinds and amounts received, and from whom, and shall be accountable in kind, with the qualification aforesaid, for whatever he may have thus received, or, in default thereof, for the same amount of specie currency. Any such receiver, in failing to comply with any of the foregoing requisitions, shall be deemed guilty of a misdemeanor, and on conviction thereof, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one month, or by both fine and imprisonment as aforesaid, and may be removed from office by judgment of the court trying the case."

Gen. Laws Texas 1862, p. 38.

By an act approved December 16, 1863, it was provided by section 1 "that the comptroller of the State be and he is

hereby authorized to receive from the railroad companies in this State, who are indebted to the special school fund, *all interest* on their bonds that may now be or hereafter become due: *Provided*, The same is tendered in State bonds or in State treasury warrants previous to the meeting of the next regular session of the State legislature;" and by section 2 "that for all sums so paid in the comptroller and treasurer shall issue to the special school fund the bonds of the State bearing six per cent. interest."

Gen. Laws Texas 1863, p. 37.

This act was amended by an act approved May 28, 1864, to the effect that the act of 1863 should not apply to railroad companies that failed or refused to "receive State bonds or State treasury warrants at par for freight or passage at the prices or rates established by law," and when satisfactory evidence was furnished the comptroller of such failure or refusal he was required to decline accepting payment of interest in State bonds or warrants.

Gen. Laws Texas 1864, p. 9.

By an act approved November 15, 1864, it was provided "that the railroad companies of this State that are indebted to the special school fund shall continue to be allowed the privilege of paying the *interest* due said fund in the treasury warrants and bonds and coupons of the State and may also discharge the whole or any part of the *principal* of their indebtedness to that fund (in the same manner), provided said railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par with specie for freight and passenger travel," and that "all treasury warrants and bonds and coupons of the State so received into the treasury shall be cancelled and the comptroller shall issue the bonds of the State bearing six per cent. interest to the special school fund for the amounts so paid in."

Gen. Laws Texas 1864, p. 14.

The brief of plaintiff in error has not yet been filed. In the answer and in the only argument so far filed in this court it is urged that these transactions were recognized and approved by the State since the war. As bearing upon that, as well as other features of the case, it is interesting to follow the history of the matter further.

By section 8, article 7, of the constitution of Texas of 1866, it was provided: "And in no case shall the legislature have the power to issue treasury warrants, treasury notes or paper of any description intended to circulate as money," and by section 36, article 7, of that instrument, it was provided that "the legislature shall have no power directly or indirectly to release any railroad company from the payment *in specie* of the principal or interest of the obligations or debts due to the school fund or to the State."

Sayles' Constitutions, pp. 320, 325.

"All debts created by the State of Texas in aid of the late war, directly or indirectly," were declared null and void by the Texas convention of 1866, including warrants issued between January 28, 1861, and August 5, 1865.

Sayles' Constitutions, pp. 333, 334.

U. S. Constitution, sec. 4, amendment 14.

By section 6 of an act of the legislature of Texas approved November 9, 1866, indebtedness of the State which accrued subsequent to March 2, 1861, and prior to September 6, 1865, was in effect declared void.

Gen. Laws Texas 1866, p. 124.

It was provided by section 7 of an act approved November 10, 1866, "that all railroad companies that are owing interest upon their bonds for loan of the common-school fund shall have an extension of time for the payment of the interest now due, as follows: The entire amount of interest now due shall be divided into eight equal parts, and

paid as follows, *in specie:* One equal eighth part due by each company shall be paid on or before the first day of January next; and one equal eighth part every six months thereafter until the entire amount shall have been paid; *provided* that on failure of any company to pay any one of such installments, as above stipulated, such company shall forfeit the benefits of this act and the entire amount of interest then due shall be collected as now provided by law."

Gen. Laws Texas 1866, p. 129.

The committees on education and finance in the reconstruction convention of Texas denounced the attempted payment of this debt in warrants as inequitable and void.

Journal of Convention, pp. 482, 604, 605, 607.

The reconstruction convention adopted August 29, 1868, a declaration practically consolidating the Houston and Texas Central railway and the Washington County railway, and authorized the provisional governor to accept bonds of the former road "for the whole amount of principal and interest due to the State" from both roads on the 1st day of July, 1868. This, taken in connection with other matters, is a declaration of the invalidity of the payments in warrants, but the exchange was never made.

Journal of Convention, pp. 886, 907, 939.

It should be borne in mind also that the authority of this convention was only to "frame a constitution and civil government" in conformity with the reconstruction acts of Congress to be submitted to the people.

The following provisions of the constitution of Texas of 1869 are pertinent:

SECTION 6, ARTICLE 12:

"And in no case shall the legislature have the power to issue treasury warrants, treasury notes or paper of any description intended to circulate as money."

SECTION 34, ARTICLE 12:

"*All* debts created by the so-called State of Texas from and after the 28th day of January, 1861, and prior to the 5th day of August, 1865, were and are *null and void;* and the legislature is prohibited from making any provision for the acknowledgment or payment of such debts."

SECTION 14, ARTICLE 1:

"No bill of attainder, *ex post facto* law, *retroactive law, or any law impairing the obligation of contracts,* shall be made * * * nor shall any law be passed *depriving a party of any remedy for the enforcement of a contract which existed when the contract was made.*"

Sayles' Constitutions, pp. 387, 388.

SECTION 9, ARTICLE 9:

"The legislature shall *annually appropriate for school purposes* and to be equally distributed among all the scholastic population of the State, *the interest* accruing on the school fund, and the income derived from taxation for school purposes; and shall from time to time, as may be necessary, invest the *principal* of the school fund in the bonds of the United States Government; *and in no other security.*"

SECTION 6, ARTICLE 9:

"As a basis for the establishment and endowment of said public free schools, all the funds, lands and other property *heretofore* set apart and appropriated, or that may hereafter be set apart and appropriated for the support and maintenance of public schools, shall constitute the public school fund. And all sums of money that may come to this State hereafter from the sale of any portion of the public domain of the State of Texas, shall also constitute a part of the public school fund. And the legislature shall set apart, for the benefit of public schools, one-fourth of the annual revenue derivable from general taxation; and shall also cause to be levied and collected an annual poll tax of one dollar on all male persons in this State, between the ages of twenty-one and sixty years, for the benefit of public schools. And said fund

and the income derived therefrom and the taxes herein provided for school purposes, shall be the perpetual fund, to be applied, as needed, exclusively for the education of all the scholastic population of the State; *and no law shall ever be made appropriating such fund for any other use or purpose whatever.*"

Sayles' Constitutions, pp. 447, 465, 441, 442, 443.

On August 13, 1870, an act was approved for the "relief" of railroad companies indebted to the State for loans from the special school fund. By section 1 it was provided that any company so indebted to the State might avoid the sale of its road for non-payment of principal or interest by the payment into the treasury of the State on the first day of November, 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, 1870, and by the payment, in addition, on said first day of November of 1 per cent. upon said aggregate amount, to be applied toward the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest and 1 per cent. on account of said sinking fund semi-annually thereafter. By section 2 it was provided that if any company failed to pay according to the act, then the whole debt became due, and the governor was authorized to sell the road, and by section 3 it was provided that the State would not exact payment of the principal except through the 1 per cent. sinking fund, but any company might pay the principal in full at any time on thirty days' notice to the governor, and that the mortgage of the State should not attach to road thereafter constructed.

Gen. Laws Texas 1870, p. 85.

The legislature of Texas passed an act known as the special law of August 15, 1870. It was vetoed by Governor Davis in a strong message (Record, pages 142 to 146), but

was passed over the veto. In its bearing upon the principal question on the merits of this case, this act consolidated the Houston and Texas Central railway and the Washington County railroad; provided that "for the whole amount of principal and interest due to the State by the Houston and Texas Central Railway Company and the Washington County Railroad Company, on the first day of July, 1870, the governor of the State shall accept and receive from the Houston and Texas Central Railway Company the seven per cent. land-grant sinking-fund first-mortgage gold interest-bearing bonds of said company, which said bonds, also payable in gold, are issued, or to be issued by virtue of a deed of trust executed by the said company on the first day of July, 1866, and mature on the first day of July, 1891;" that "the governor shall, after making the exchange of bonds herein provided for, cancel and deliver to said railway company, the six per cent. bonds of the Houston and Texas Central Railway Company and of the Washington County Railroad Company, now held by the State for sums borrowed from the school fund," and that "in making the settlement herein provided for the Houston and Texas Central Railway Company shall be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865, by the said company and by the Washington County Railroad Company, upon the accounts on which said sums were respectively paid by said companies, the said sums amounting in the aggregate to $152,864.55."

Special Laws Texas 1870, pp. 326, 327.

Governor Davis and all the succeeding executives refused to execute this law as to exchange of bonds and crediting payments in warrants, upon the ground, it is presumed, that in their opinion it was unconstitutional and void. The comptroller of public accounts of the State, after the passage of this act, acting upon the opinion of the attorney general,

which will be found in the appendix to the journal of the reconstruction convention, refused to allow credits for alleged payments in State warrants, and this action has been followed by his successors in office. A new principal was determined by the comptroller by adding to the balance of the principal loaned to the companies the balance of the interest due, excluding from the computation all payments in State warrants. The companies made payments from 1870 until 1893, inclusive, under protest, and this action was instituted in 1894 upon default in payments.

The constitution of Texas of 1876 (section 54, article 3) provides:

"The legislature shall have no power to release or alienate any liens held by the State upon any railroad or in anywise change the tenor or meaning or pass any law explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired."

Sayles' Constitutions, p. 523.

On February 23, 1883, an act was approved which provided that the bonds for the sum of $320,367.13, executed by the State to the common school fund under the act of November 15, 1864, were "valid debts from the State to the common school fund," but it was expressly declared that "by the payment of said bonds, as aforesaid, the State does not recognize the validity of said attempted payments in treasury warrants."

Gen. Laws Texas 1883, p. 16.

From this review it clearly appears that whenever the subject has been acted upon by legislatures or constitutional conventions this attempted payment in worthless and void warrants has been denounced, with the exception of the special act of August 15, 1870, and this will be shown to have been enacted in flagrant and contemptuous violation of constitutional law, State and national.

The Pleadings and Nature of the Case.

On December 8, 1894, C. A. Culberson, then attorney general of Texas, instituted this suit in the district court of Travis county, Texas, in the name of the State of Texas against the plaintiff in error, and it was tried in the State courts by Attorney General Crane. It was a simple action of debt and to foreclose the statutory lien on the railroad property of that company to secure loans made by the State to the company and the Washington County Railroad Company under the act approved August 13, 1856, already referred to. There was not the most remote suggestion of a Federal question in the original petition.

Record, pp. 1 to 5.

The defendant company filed a voluminous answer, in substance pleading (1) part payment of interest and sinking fund in lawful money, and (2) payment of the balance in warrants and treasury notes of the State of Texas issued after the secession ordinance was passed and which said payment in warrants and treasury notes was authorized by several acts of the legislature enacted between 1861 and 1865, and heretofore set out. It was insisted in the answer that these several acts of the legislature and the acts passed August 13 and 15, 1870, heretofore referred to, constituted contracts between the State and the company which were within and entitled to the protection of article I, section 10, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts, and that to disallow payment under these statutes would deprive the company of its property without due process of law, in violation of the fourteenth amendment. This answer, however, did not point out any law of the State of Texas, constitutional or statutory, under which it was sought to impair the obligation of the alleged contracts or which directly or indirectly was intended to have such

effect or upon which such construction had been or could be placed.

Record, pp. 5 to 24.

Under the practice in Texas the replication of the plaintiff to the answer of defendant is termed the supplemental petition and contains no part of the statement of the cause of action.

47 Texas, 616, Rules 3, 4, and 5.

The first supplemental petition of plaintiff, The State of Texas, alleged that the pretended payment in warrants and treasury notes was illegal and void, because:

1. The said warrants and treasury notes were issued "in aid of the rebellion."

2. The company purchased said warrants and notes in the market for a nominal sum and sought to make payment with them at par.

3. The said warrants and notes were issued for the purpose of being circulated as money, in violation of the constitution of Texas.

4. The said warrants and notes were bills of credit, and inhibited by section 10, article I, of the Constitution of the United States.

Record, pp. 24 to 29.

5. That the public schools had a vested right in the fund loaned to the companies which the legislature could not destroy by authorizing payment in warrants. This contention, however, rested on the *State* constitution, not the Federal Constitution, as counsel for plaintiff in error argue.

Record, pp. 24, 39, 210.

The defendant company filed application and bond for the removal of the cause to the circuit court of the United States, alleging that the first supplemental petition of plaintiff, The State of Texas, showed that the cause of action was one arising under the Constitution and laws of the United States, which application was denied.

Record, pp. 29 to 38.

The subsequent pleadings of the plaintiff, The State of Texas, amplified the five grounds of defense to the alleged payment in warrants and notes contained in the first supplemental petition, and, in addition, insisted that if defendant company be allowed any credit for said pretended payments in warrants and notes it should not exceed the cash value thereof at the time they were delivered in so-called payment.

Record, pp. 38 to 43.

The defendant company, in reply, plead that the State having accepted the warrants and notes was estopped to question their validity, and if they were in fact and in law void and issued "in aid of the rebellion" the State was *in pari delicto* and not entitled to relief.

Record, pp. 43 to 49.

Judgment *in personam* for the amount sued for was rendered for the State, with foreclosure of the lien. The judgment was reformed so as to be *in rem* only and foreclosure of the lien on less road, and affirmed by the court of civil appeals for the third supreme judicial district; the supreme court of the State refused a writ of error, and upon application of plaintiff in error the chief justice of the court of civil appeals for the third supreme judicial district allowed a writ of error to review the judgment.

Record, pp. 73, 217, 271, 314.

The defendant company admitted in effect the cause of action of plaintiff unless the alleged payment in warrants and notes was legal (Record, pp. 96, 101, 135), and besides the question of removal the only question determined by the court of civil appeals was that said warrants and notes in which payment was pretended to be made were intended to circulate as money, and were therefore issued in contravention of section 8, article VII, of the State constitution of 1845. Whether they were issued contrary to section 10, article I, of the Federal Constitution was not considered.

Record, pp. 213, 214.

The court of civil appeals made the following finding of facts:

"We find that the bonds sued upon by the State were executed by the Houston & Texas Central railway and the Washington County railway, as alleged, and that the Central railway acquired all of the rights and property of the Washington County railway and took the property of that road subject to the liens asserted by the State. We find that the defendant made the payments pleaded in its answer, but that such payments as were made in State warrants were in treasury warrants intended by certain acts of the legislature of the State to circulate as money. We find that prior to August 13th, 1870, the Houston & Texas Central Railway Company's line of road extended from the left bank of Buffalo bayou, in the city of Houston, Texas, one hundred and fifty miles in a northwesterly direction through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, and Limestone, and that the Washington County railway extended twenty-one and a quarter miles from the town of Hempstead, in Waller county, to Brenham, in Washington county, and we also find that the amount due the State is the amount for which the judgment was rendered. In view of the disposition we make of the case, these are all the facts we feel called upon to find."

Record, p. 211.

These facts and some others stated in the body of the opinion are conclusive upon this court.

Carter *vs.* Ruddy, 166 U. S., 493.

Strictly speaking, the questions of law arising upon the record under the decisions probably are (1) whether this court has jurisdiction, (2) whether the State treasury warrants were intended to circulate as money, and (3), if they were intended to circulate as money, whether the court of civil appeals erred in disallowing payments made in them; but as it is not entirely clear what will be considered (Dower *vs.* Richards, 151 U. S., 658), the whole case will be argued.

I.

This court is without jurisdiction, and the writ of error should be dismissed.

1. It is well settled that a cause is not now removable to the Federal courts unless the Federal question appears from the plaintiff's statement of his own cause of action.

Tennessee *vs.* Bank, 152 U. S., 454.
Hanrick *vs.* Hanrick, 153 U. S., 197.
Chappell *vs.* Water Works, 155 U. S., 108.
Telegraph Co. *vs.* Alabama, 155 U. S., 487.
Land Co. *vs.* Brown, 155 U. S., 488.
R. R. Co. *vs.* Davidson, 157 U. S., 208.
U. S. *vs.* Telegraph Co., 159 U. S., 553.
R. R. Co. *vs.* Skottowe, 162 U. S., 495.
Pratt *vs.* Gaslight Co., 168 U. S., 258.
R. R. Co. *vs.* Texas, 170 U. S., 236.
Sawyer *vs.* Kochersperger, 170 U. S., 303.

Counsel for plaintiff in error, while admitting the above rule and conceding that no Federal question appears from the original petition, as shown by the application for re-

moval, insist that a Federal question is presented in the first supplemental petition of the State, presumably referring to the allegation that the warrants and notes were bills of credit and were issued in violation of section 10, article I, of the Constitution of the United States, which takes the case out of this rule.

Under the present removal act this cause is not removable unless the action, as shown by the original petition and the first supplemental petition, could originally have been instituted in the circuit court of the United States; and, obviously, the interposition to the defense of payment, that the warrants were issued in contravention of the Federal Constitution, would not give the circuit court original jurisdiction, even though in the course of the litigation it may have been necessary to construe the Federal Constitution on that point.

Gold Washing Co. *vs.* Keys, 96 U. S., 199.
Tennessee *vs.* Bank, 152 U. S., 460, 462.
New Orleans *vs.* Benjamin, 153 U. S., 411.

In a somewhat similar case, the circuit court of appeals of the eighth circuit said:

"It is apparent that the only use the plaintiff proposes to make of the Constitution, is as a barrier to a defense which the plaintiff suggests the defendant may set up. The appeal to the Constitution is made, not to support the plaintiff's cause of action, but by way of replication to an anticipated defense."

City of Fergus Falls *vs.* Fergus Falls Water Co., 72 Fed. Rep., 875.

Seeking to avoid the decision in *Tennessee vs. Bank, supra*, and others cited which follow it, counsel for plaintiff in error (Mr. Carlisle) argues (1) that this action was not brought on the bonds, and (2) that it was part of the plaintiff's case to overthrow the payments by pleadings and

proof because the so-called contracts had been *executed*. As clearly as it was possible the action was on the bonds. The original petition declared on the bonds in express terms (Record, pp. 1, 2), and the prayer was that "judgment be given it that there is due upon the obligations aforesaid the sums of money heretofore stated, with interest as set forth" (Record, p. 4). The second reason assumes the existence and execution of contracts, the very questions in controversy. The theory of the State is that the laws authorizing payments in warrants were absolute nullities, and therefore her case or cause of action does not depend, as counsel urges, upon having "affirmative relief against its own executed contracts, and the payments made and accepted under them." To the State there were no contracts, and the alleged payments were absolute nullities (Richards *vs.* Stogsdell, 21 Ind., 74). On the contrary, the theory and defense of the plaintiff in error rested and depended upon the alleged contracts and payments, which, to be availed of, must have been alleged and proved.

It was not a question of setting aside payments on the ground of fraud, accident, mistake, or *duress*. The issue was payments *vel non*, and payment is essentially not only a defense, but an *affirmative defense*, which the defendant must plead and prove.

2 Green. Ev., sect. 516 (Lewis's edition).
Wolffe *vs.* Nall, 62 Ala., 24.
Lerche *vs.* Brasher, 104 N. Y., 161.
Tootle *vs.* Maben, 21 Neb., 617.

In a late case in this court, a city entered into a contract for the construction of water works. Upon completion of the work an order drawn on the city by the contractor in favor of the material-men for a sum of *money* was accepted, payable in *city warrants*. Suit was instituted upon the order and acceptance, to which a demurrer was interposed, and in disposing of the case this court said:

"In support of its second ground of demurrer the defendant city further insists that inasmuch as the acceptance of the city was a promise to pay in *city warrants*, the petition should allege that the plaintiffs demanded payment in warrants, and that the city refused to give them warrants for the order. The order, however, was to pay a certain sum in dollars and cents, and the promise was to pay the amount of the acceptance, *and if payment had been made or tendered, either in current money or city warrants, it was matter of defense, and the burden of proof was upon defendant.*"

Superior City *vs.* Ripley, 138 U. S., 97, 98.

This is the rule by statute in Texas:

"In every action in which the defendant shall desire to prove any payment, counter-claim or set-off, he shall file with his plea an account stating distinctly the nature of such payment, counter-claim or set-off and the several items thereof; and on failure to do so he shall not be entitled to prove the same unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof."

Rev. Stats. Texas 1895, art. 1266.

Under this statute payment must be specially pleaded, and proof thereof is not admissible under a general denial.

Batts' Texas Statutes, art. 1266.

The plaintiff in error accepted this view of the law by specially and particularly pleading payments and offering proof thereof.

The burden was not only upon plaintiff in error of showing payments in warrants, but if any of them were lawfully receivable and others not, as having, for instance, been issued "in aid of rebellion," the burden was upon it to show that payments were made in warrants free from illegality or taint.

Land Grant Co. *vs.* Dawson, 151 U. S., 586, 604, 605.
Mill Company *vs.* Johnson, 156 U. S., 574.

2. No question arising under the Constitution or laws of the United States is otherwise presented by the record.

It will be remembered that the answer of defendant company sought to raise Federal questions: (1) By alleging that certain acts of the legislature of Texas passed between 1861 and 1865, authorizing the payment of interest and sinking fund on the loans to said company in State warrants and treasury notes, and acts passed August 13 and 15, 1870, the last purporting in effect to ratify said payment, constituted contracts between the State and the company which were within and entitled to the protection of article I, section 10, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts; and (2) that to disregard the alleged payment in warrants and notes would deprive the company of its property without due process of law, in contravention of the fourteenth amendment to the Federal Constitution.

Record, pp. 12, 13, 14, 20, 21.

When the case reached the court of civil appeals it was not assigned as error that the district court refused to give effect to these contentions, *in violation of the Constitution of the United States.* The contention then was that the court refused to allow these payments *in violation of State laws* (Record, pp. 191 to 203) (Kipley *vs.* Illinois, 170 U. S., 182). The Federal questions were therefore waived and abandoned.

R. R. Co. *vs.* Herbeck, 60 Texas, 602.
Sayles' Texas Civil Practice, sec. 1168.

It is true these contentions after having been thus abandoned were renewed in the motion for a rehearing in the

court of civil appeals (Record, p. 234), but that was as if first presented on rehearing, and consequently too late.

Brown *vs.* Colorado, 106 U. S., 95.
Boom Co. *vs.* Boom Co., 110 U. S., 59.
Spies *vs.* Illinois, 123 U. S., 181.
R. R. Co. *vs.* R. R. Co., 137 U. S., 48.
Caldwell *vs.* Texas, 137 U. S., 698.
Miller *vs.* R. R. Co., 168 U. S., 131.

In abundance of caution, however, they will be traced through the record and fully considered.

In the petition for writ of error to the court of civil appeals (Record, p. 258) and in the motion for a rehearing thereon (Record, pp. 281, 282) the two Federal questions are again presented. In the application for a writ of error to review the judgment in this court there is a general averment in the language of section 709, Revised Statutes of the United States (Record, p. 295), and specific allegations (Record, pp. 301, 302, 309, 310, 313) covering the same two Federal questions which appeared in the answer and other pleadings named. So much of the assignment of errors in this court as affects the question is as follows:

"THIRD.

"The said court of civil appeals erred in deciding against the validity of an authority exercised under the United States drawn in question in this cause.

"FOURTH.

"The said court of civil appeals erred in deciding against the title, right, privilege, and immunity specially set up and claimed by said plaintiffs in error under the Constitution and statutes of and authority exercised under the United States.

"FIFTH.

"The said court of civil appeals erred in deciding in favor of the validity of statutes of and authority exercised under the State of Texas drawn in question in this cause on the ground of their being repugnant to the Constitution and laws of the United States.

"SIXTH.

"The said court of civil appeals erred in giving validity to the provisions of the constitution of Texas adopted in 1869 and the statute of Texas, approved August 13, 1870, drawn in question in this cause under a construction thereof, which impaired the obligation of the contract entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the provisions of the acts of the legislature of the State of Texas approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864.

"SEVENTH.

"The said court of civil appeals erred in giving effect to the constitution of Texas adopted in 1869 and the statute of Texas approved August 13, 1870, as impairing the obligation of the contract provision entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the acts of said State approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864.

"EIGHTH.

"The said court of civil appeals erred in sustaining the validity of the authority exercised under the State of Texas by the governor and comptroller thereof in canceling and discharging credits for payments made under and in accordance with the provisions of the acts of the legislature of Texas approved February 9, 1861, December 16, 1863, May

28, 1864, and November 15, 1864, drawn in question in this cause on the ground of its being repugnant to the Constitution and laws of the United States.

"NINTH.

"The said court of civil appeals erred in affirming the validity of the action of the State of Texas through the governor and comptroller in canceling and discharging credits given for payments made by the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and in accordance with the said acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, whereby said plaintiff in error was deprived of its property without due process of law, contrary to the Constitution of the United States.

"TENTH.

"The said court of civil appeals erred in deciding in favor of the validity of the action of the State of Texas, which, if held valid, deprived said plaintiff in error of property without due process of law.

"ELEVENTH.

"The said court of civil appeals erred in sustaining the action of the State of Texas in depriving said plaintiff in error of property, to wit, valid treasury warrants issued under authority of said State of Texas, without due process of law by taking such private property for public uses without compensation therefor."

Record, pp. 290, 291, 292.

Assuming that the Federal questions relied upon are those specified in this assignment of errors, they will be considered with some additional propositions:

1. The third, fourth, fifth, and tenth grounds are too vague and indefinite for consideration.

Lawler *vs.* Walker, 14 How., 149.

Maxwell *vs.* Newbold, 18 How., 511.

Messenger *vs.* Mason, 10 Wall., 507.

2. The eleventh ground, besides being vague and indefinite, is without merit, because the fifth amendment is restrictive of Federal authority only.

Withers *vs.* Buckley, 20 How., 84.

Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112.

R. R. Co. *vs.* Nebraska, 164 U. S., 403.

Nor would this be taking of property for public use within any reasonable meaning of the decisions of this court.

R. R. Co. *vs.* Chicago, 166 U. S., 226.

Backus *vs.* Depot Co., 169 U. S., 557.

3. It is matter of astonishment that the sixth and seventh grounds should be presented. The plaintiff in error, in its answer and as otherwise pointed out herein, insisted that it was authorized to make payments in warrants and notes under the acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864. It also insisted that this right was confirmed, not denied, by the acts passed August 13 and 15, 1870 (Record, pp. 15, 16, 21, 22). The court of civil appeals held (Record, pp. 213, 214) that the acts of 1861, 1863, and 1864 above mentioned, which authorized the issuance of warrants to circulate as money, were in violation of section 8, article VII, of the State constitution of 1845, which declared that "in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." The validity of these acts, tested by the constitution of 1869, was neither considered nor decided by the court. Nor was it held, as the assignment of errors assumes, that the acts of August 13 and 15, 1870, were in conflict with the acts of 1861, 1863, and 1864. In considering the contention of plaintiff in error that the acts of 1870 ratified the previous legislation the court held that they could not be given that effect (Record, p. 215), because the constitu-

tion of 1869 contained a similar provision to the constitution of 1845 against the issuance of warrants and notes intended to circulate as money; but manifestly this does not raise a Federal question, inasmuch as legislation *subsequent* to the acts of 1861, 1863, and 1864 was not the basis of the judgment as to them, but as to these the basis was the constitution of 1845, and as to the acts of 1870 the basis was the constitutions of 1866 and 1869.

Palmer *vs.* Marston, 14 Wall., 10.

Waterworks *vs.* Sugar Co., 125 U. S., 15.

The rule is thoroughly settled and is thus stated by this court:

"If the judgment of the State court gives no effect to the *subsequent* law of the State and the State court decides the case upon grounds independent of that law a case is not for review by this court upon any ground of the impairment of a contract."

Bacon *vs.* Texas, 163 U. S., 216.

Nor will this court pass upon the character or existence of a contract unless the judgment of the State court gives effect to a *subsequent law* of a State.

Bacon *vs.* Texas, 163 U. S., 219.

4. It is evident that under the eighth and ninth grounds in the assignment of errors an effort is made to obscure and distort the proceedings in order to give this court apparent jurisdiction. It should be a sufficient answer to the eighth ground that the court of civil appeals did not sustain the authority exercised under the State of Texas by the governor and comptroller, but simply declared that the alleged payments were nuliities (10 Wallace, 540); the governor or comptroller is not "an authority exercised under any State" within the meaning of section 709, Revised Statutes (Bethell *vs.* Demaret, 10 Wallace, 537), and the Federal Constitution is not aimed at individual but State legislative action

(Waterworks *vs.* Sugar Co., 125 U. S., 30), and to the ninth ground, that there has been and will be no deprivation of property except by the decree herein, which is due process of law.

Morley *vs.* R. R. Co., 146 U. S., 171.

A real and not fictitious question is necessary to give jurisdiction.

Hamblin *vs.* Land Company, 147 U. S., 531.

But let us measure these grounds by section 709, Revised Statutes of the United States, under which alone this court can take jurisdiction, said section being as follows:

"A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Obviously jurisdiction does not attach under the first clause of this section, as there was not drawn in question the validity of any treaty or statute of or authority exercised under the United States. Nor does the second clause give jurisdiction because while there was drawn in question the validity of a statute of and an authority exercised under the State of Texas, on the ground of their repugnance to the

Constitution of the United States, namely, the acts of 1861, 1863, and 1864, yet no decision was rendered upon the point, much less "in favor of their validity."

Bank *vs.* Griffith, 14 Pet., 56.

Walker *vs.* Taylor, 5 How., 64.

Is any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute or commission held or authority exercised under the United States, which will give this court jurisdiction under the third clause of this section? By the assignment of errors it is attempted to bring the case within the fourteenth amendment by alleging that the clerical act of the comptroller under the direction of the governor in restating the account was a deprivation of property without due process of law, but manifestly this could have no such effect and cannot be taken seriously (Wilson *vs.* North Carolina, 169 U. S., 586). Aside from this, beneath the thin disguise of the pleader, it is evident that no right, title, privilege, or immunity under the Federal Constitution is claimed or can in good faith be claimed. The right to pay the debt in State warrants and notes, which is the only right in controversy, arises, if at all, under the laws of the State and not under the Federal Constitution. This court in determining its jurisdiction will look beyond the mere language of the pleadings to the real character and source of the right asserted.

R. R. Co. *vs.* California, 118 U. S., 113.

The bare assertion of a Federal question is not sufficient.

New Orleans *vs.* Water Works Co., 142 U. S., 79.

Kaukauna Co. *vs.* Green Bay Canal, 142 U. S., 254.

5. Stripped of mere verbiage, the contention of plaintiff in error is that this court has jurisdiction because the court of civil appeals refused to give effect to the supposed contract or because its judgment in its effect impairs the obligation

of such contract. It has been clearly shown that no Federal question was decided or was necessary to be decided; that the decision was based wholly upon the ground that the warrants and notes in which payment of the debt sued on purports to have been made were issued in violation of the State constitution—a contention urged and insisted upon in Texas for thirty years; that this is purely a question of State law, and under all the authorities this court is without jurisdiction.

Knox *vs.* Bank, 12 Wall., 379.
Klinger *vs.* Missouri, 13 Wall., 263.
McManus *vs.* O'Sullivan, 91 U. S., 579.
Bolling *vs.* Lersner, 91 U. S., 594.
Crossley *vs.* New Orleans, 108 U. S., 105.
Water Works *vs.* Sugar Co., 125 U. S., 30.
De Sassure *vs.* Gaillard, 127 U. S., 234.
Bacon *vs.* Texas, 163 U. S., 216.
Paper Co. *vs.* Watson, 173 U. S., 443.
White *vs.* Leovy, 174 U. S., 91.

"Nor are we authorized by the judiciary act to review this judgment of the State court, because this judgment refuses to give effect to a valid contract, or because such judgment in effect impairs the obligation of a contract."

Morley *vs.* R. R. Co., 146 U. S., 171.

II.

If this court assumes jurisdiction the judgment of the court of civil appeals was right, upon the ground put by the court, and others, and should be affirmed.

FIRST.

The acts of the legislature of Texas approved February 9, 1861; December 16, 1863; May 28, 1864, and November

15, 1864, which authorized payments in State warrants, were unconstitutional and void.

This court has solemnly adjudged that "Texas continued to be a State and a State of the Union," notwithstanding the ordinance of secession (Texas *vs.* White, 7 Wall., 726), and counsel for plaintiff in error will probably concede that the people in that State during the period of the war lived under some constitution. Whether in or out of the Union and whatever the constitution, these acts were passed without constitutional authority in the following particulars:

1. *As impairing the obligation of contracts* between the State and the companies, evidenced by the bonds and the law of 1856, they were in violation of section 14, article 1, of the State constitutions of 1845 and 1861; of section 10, article 1, of the constitution of the Confederate States, with the exception of the act of February 9, 1861, passed before the Confederate constitution was adopted in Texas; or section 10, article 1, of the Constitution of the United States.

The bonds and coupons were payable in dollars, which means lawful money of the United States.

Bank *vs.* Supervisors, 7 Wall., 30.
Confederate Note Case, 19 Wall., 557.
Legal Tender Case, 110 U. S., 449.

If the warrants are held not to have been issued as money, the acts in question impair the obligation of the contracts, because payments are not to be made in dollars or money of any kind; and if the warrants are held to be money, besides being issued in violation of the State constitution, the obligation of the contracts is impaired because payments may be made not only in a different, but in a depreciated and practically worthless money and a money not authorized by Congress. It is undisputed (Record, pp. 136, 137, 166) that in 1863, 1864, and 1865 the warrants had a value not exceeding ten cents on the dollar.

It may be said, with reference to impairing the obligation of contracts, that the school fund was kept intact by the issue of bonds in lieu of warrants paid in. That is true as to some of the laws, but while the school fund lost nothing, the State did, which is the material inquiry.

Sturges *vs.* Crowninshield, 4 Wheat., 205.
Green *vs.* Biddle, 8 Wheat., 1.
Woodruff *vs.* Trapnall, 10 How., 206.
Virginia Coupon Cases, 114 U. S., 278.

2. As authorizing *the emission of bills of credit* by the State, they were in violation of section 10, article 1, of the Constitution of the United States.

Craig *vs.* Missouri, 4 Peters, 410.
Briscoe *vs.* Bank, 11 Peters, 257.
Darrington *vs.* Bank, 13 How., 12.
Legal Tender Cases, 12 Wall, 557, 558.
Virginia Coupon Cases, 114 U. S., 284.
Bank *vs.* Mahan, 21 La. An., 751.
Bragg *vs.* Tuffts, 49 Ark., 554.

3. As authorizing the *issue of treasury warrants intended to circulate as money*, they were in violation of section 8, article 7, of the State constitutions of 1845 and 1861.

In 1860, when the State and nation were at peace and when there was no necessity to violate the Constitution in order to float an independent currency, the legislature, at least ostensibly respecting the organic law, declared that unpaid warrants should not circulate as money. Eight days after the secession ordinance was adopted, foreseeing the need of some stimulus for paper money, the comptroller and treasurer were directed by law to receive treasury warrants *for money* in certain named transactions. In November, 1861 (Record, pp. 155, 156), the comptroller, who is a kind of secretary of the treasury for the State, made

elaborate recommendations to the governor to "provide and establish the par value of treasury warrants." The treasury, he said, was empty; it could not be replenished by the sale of bonds, and the taxes for the year were not available. His plan was to limit the issue of warrants to the revenue required and make the warrants "receivable for taxes and all public dues," which would make the warrants "equivalent to specie." The governor of the State, in his message of November 15, 1861 (Record, pp. 156 to 159), commended these recommendations of the comptroller to the legislature, urging the issue of treasury warrants, and in order to "cause them to appreciate to at least near their face value," insisted that they be made "receivable in payment of taxes and for all other public dues of whatever nature or kind." Accordingly, on January 10, 1862, the act of 1860 was repealed; the provision therein as to the circulation of warrants as money was abrogated, and warrants were drawn, as shown by the law and the testimony (Record, pp. 179 to 184), in size, shape, denomination, and color (Record, p. 214) suitable for currency. On the next day, January 11, 1862, State treasury warrants, not bearing interest, as well as treasury notes and coupons of the Confederate States, were made receivable "*as money*" *for all obligations due the State except in two cases.* These two exceptions were afterward removed.

Subsequently, on the same day, the treasurer and every other officer of the State and every officer of counties who received as public money State warrants or Confederate notes or coupons were required by law to disburse said warrants and notes and coupons "*as money,*" and officers who were authorized to receive public money were authorized to receive said warrants, notes, and coupons "*as money,*" except when expressly prohibited by some other law. These laws seem to have had some effect upon the value of State warrants, for in the message of the governor of February 5, 1863, he states that the warrants were more appreciated than

Confederate notes (Record, p. 161), although the currency was greatly depreciated, and corroborates this argument by the statement (Record, p. 163) that one of the causes of depreciation was that in Texas "paper representing money" was current. The intention and effort to cause warrants to circulate as money was still further manifested in the acts of December 16, 1863, and May 28, 1864. The constant cry was that additional demand for the warrants must be created in order to enhance and maintain their value. Governor Lubbock apparently was satisfied (Record, p. 158) if they would "appreciate to at least near their face value," while Governor Murrah (Record, p. 166) was anxious to create "for them a general and constant demand approximating to the amount issued." So new demands were created by the acts of 1863 and 1864. The legislature was to convene, with additional requisitions upon the treasury, and by the first of these laws railway companies that were indebted to the school fund were authorized to pay *all interest* due or to become due (payment had been postponed by an act of January 11, 1862, until January 1, 1864), *provided* the same was tendered in State bonds or treasury warrants prior to the meeting of the legislature; and by the act of 1864, referred to, the demand for warrants was increased by requiring railway companies, to avail themselves of the act of 1863, to receive the bonds and warrants at par for freight and passage. To this period only the 2 per cent. *sinking fund* and the 6 per cent. *interest* could be paid in warrants; so the act of November 15, 1864, was passed, creating a still further demand for the warrants by authorizing the *principal* of this inviolable fund to be paid in them.

We have therefore (1) the clearly expressed legislative intention that the warrants should circulate as money, (2) their actual and general circulation as such, (3) the size, shape, color, and denomination of paper currency, and (4) their receivability for taxes and every character of Government dues.

They were issued by the State, involved the faith of the State, and were designed to circulate as money on the credit of the State in the ordinary uses of business.

The court of civil appeals found as a fact that the payments made in warrants were in warrants issued *after* the time they were intended to circulate as money (Record, p. 214).

Virginia Coupon Cases, 114 U. S., 284, 285, and authorities cited in preceding paragraph 2 of this argument.

SECOND.

The acts of the legislature of Texas approved February 19, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, were passed, and the action of the railway companies under and by virtue thereof was taken, in aid of secession, and were therefore null and void.

As bearing upon the question under consideration, these acts provided that State bonds and treasury warrants should be receivable for the interest, sinking fund, and principal of the loans made to the companies out of the special school fund, and all other Government dues. It has already been shown, generally, from executive messages and the laws themselves, that they were enacted in aid of the movement to withdraw the State from the United States. The railway companies did know and must necessarily have known of this purpose and knowingly participated in its execution. The currency provided by the acts assumed the place and was hostile to that of the United States. It was issued and used to support the civil government of Texas, then at war with the United States, and also to provide for the military support and necessities of those engaged in war against the United States.

In the latter case, particularly, under the decisions of this court, the currency was issued in aid of secession, and, with the acts of the companies in voluntarily using and purchas-

ing it for payment of its indebtedness, thereby enhancing its value and contributing directly to the prosecution of the war, was utterly null and void. The hostile spirit and purpose of these laws, apparent on their face, is emphasized by contemporaneous State legislation. In truth, bonds and warrants which were openly and avowedly issued for war purposes were receivable under the laws in question on the indebtedness to the school fund and were actually paid on that account. The trial judge, in his opinion (Record, pp. 56, 57), cited various acts of the legislature in proof of this. Briefly put, these acts show that besides providing for the expenses of the secession convention in 1861, provision was made to issue $4,000,000 in bonds and $2,450,000 in warrants *for purely war purposes.* All these unlawful bonds and warrants were, under these acts, receivable in payment of the debts involved in this action. That advantage was taken of these laws and the indebtedness incurred is apparent (Record, pp. 157, 159, 162).

Certainly, therefore, these laws and the conduct of the railway companies thereunder were "intended to aid rebellion" and were consequently void.

Texas *vs.* White, 7 Wall., 734.
Thomas *vs.* City of Richmond, 12 Wall., 357.
Hanauer *vs.* Woodruff, 15 Wall., 439.
Taylor *vs.* Thomas, 22 Wall., 479.
Lamar *vs.* Micou, 112 U. S., 452.
R. R. Co. *vs.* State, 52 Miss., 877.

No useful purpose would be subserved by reviewing all the cases decided by this court growing out of the organization of the Confederate States. In a very recent opinion most of the cases were examined, and from them the following was deduced:

"That the transactions between persons actually residing within the territory dominated by the government of the Confederate States, were not invalid, for the reason only,

that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

"That within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so-called Confederate States;

"That what occurred or was done in respect of *such matters* under the authority of the laws of these local *de facto* governments should not be disregarded or held invalid *merely* because those governments were organized in hostility to the Union established by the National Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame, 'except when proved to have been entered into *with actual intent* to further invasion or insurrection:' and,

"That judicial and legislative acts in the respective States composing the so-called Confederate States should be respected by the courts, if they were not 'hostile *in their purpose* or mode of enforcement to the authority of the National Government and did not impair the rights of citizens under the Constitution.'"

Baldy *vs.* Hunter, 171 U. S., 400, 401.

Measured by these principles, the acts of the legislature in question were "hostile in their purpose," were enacted with the sole view of giving additional value to warrants issued in large measure to carry on the war, and unquestionably impaired the rights of citizens of Texas under the Constitution, particularly the children, born and unborn, the real

beneficiaries of the school fund. The "hostile purpose" and "actual intent" of the companies, mixed, as it may be, with an effort to reap private advantage, is equally clear and indisputable. They agreed, among other things, to take the warrants at par for freight and passage in consideration of being allowed to pay their indebtedness in them, thus indicating, with other facts heretofore stated, a sympathy for the State government and a purpose to aid its military operations. While this intention of the companies to "further invasion and insurrection" is proven, the law would impute it upon less direct testimony. In an analogous case this court said:

"He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act."

Hanauer *vs.* Doane, 12 Wall., 347.

It may be said that warrants issued wholly for the lawful support of the civil government of Texas, as contradistinguished from those issued for war purposes, were also made receivable for the debts due the school fund, and payment may have been made in part in them. The answer is that, even in that view, the legal and the wrongful are so blended in the laws that they are void for any and all purposes.

Taylor *vs.* Thomas, 22 Wall., 488.

Allen *vs.* Louisiana, 103 U. S., 80.

Bragg *vs.* Tuffts, 49 Ark., 554.

Tel. Co. *vs.* State, 62 Texas, 630.

THIRD.

The act of August 15, 1870, relied upon by plaintiff in error as ratifying and confirming the payments in warrants, is unconstitutional and void, so far as it purports to ratify these payments and to invest the fund in new railway bonds.

The two provisions of the act above mentioned—namely, as to ratifying payments and investing the fund in new railway bonds—are so blended and dependent upon each other that if either is void both are, upon well-known principles of constitutional construction.

So much of the act as attempts to ratify the payments is void because:

1. It impairs the obligation of the contracts between the State and the companies, in violation of the State and Federal constitutions, for reasons heretofore given.

2. It is in violation of section 4 of the fourteenth amendment to the Constitution of the United States and section 34, article 12, of the State constitution of 1869, as practically acknowledging and paying debts of the State thereby declared void, to wit, warrants issued in aid of secession.

3. It is in violation of section 6, article 12, of the State constitution of 1869 with reference to the issue of treasury warrants intended to circulate as money, and the Federal Constitution with reference to bills of credit, as an effort to do indirectly what was directly prohibited by these constitutions, both when the alleged payments were made and when the purported ratification was declared.

4. It is in violation of section 6, article 9, of the State constitution of 1869, which prohibits the diversion of the school fund to other than school purposes. The special school fund set aside by the act of 1854 was by this section for the first

time brought under the protection of the constitution against diversion. It will be recalled that the act of 1870 expressly directed the governor in making the settlement therein provided for to allow the companies credit for the warrants alleged to have been paid, aggregating $152,864.55. The act, however, in this particular, as in that with reference to the exchange of bonds, is not self-executing, and as every governor has refused to enforce it, these provisions have not been put into operation. This provision of the act is more than a diversion of this large sum to other than school purposes, in contravention of the constitution; it is a gift of it outright to the companies for their private use.

Section 9, article 9, of the State constitution of 1869 provides, in effect, that the legislature shall *annually* appropriate the interest accruing on the school fund for school purposes and invest the principal of the fund in bonds of the United States Government and in no other security. In plain violation of this the act of 1870, under consideration, provides that the *interest* then due shall go, not to the schools, but in exchange for new bonds of the companies, and that the *principal* (as well as interest) shall be invested, not in bonds of the United States, but in new bonds of the companies alleged to have been worth $250,000 less than the old ones.

Record, p. 144.

The act was passed in such palpable and reckless disregard of constitutional law that argument and elaboration are useless.

The general act of August 13, 1870, is not susceptible of the construction of ratifying the payments. It does not declare that the account shall be accepted as it stood on the *books of the comptroller's office* on May 1, 1870, but merely as it "stood on the first day of May, 1870," no doubt meaning as it lawfully stood. But if the act can be given the other interpretation, it is subject to the constitutional objections

urged to the special act of 1870 with reference to the ratification of payments.

If the account of the fund in the Record (pp. 115, 116, 117, 127, 128), which shows its standing on March 1, 1870, on the comptroller's books, is continued to May 1, 1870, on the theory of the State, deducting payments in warrants, the account will be as alleged in the petition and found by the court.

FOURTH.

By the act of February 9, 1861, treasury warrants were receivable in payment of the 2 per cent. *sinking fund*, but no payments of this fund are alleged to have been made in warrants. What payments of *interest* and *principal* were made were therefore made under the acts of December 16, 1863, May 28, 1864, and November 15, 1864. The finding of facts by the court of civil appeals does not show the dates of payments, but it is alleged in the answer that they were made between January 20, 1864, and May 11, 1865 (Record, pp. 11, 12), and the proof corresponded with this averment, the sum of $31,543.80 having been paid more than thirty days after the surrender at Appomattox (Record, pp. 116, 122, 123, 127, 129, 130).

By the laws under consideration, it will be remembered, *all* State warrants were receivable in payment of the school fund, and although the great bulk of the warrants issued were for *purposes of the civil war* (Record, pp. 159, 162, 170), and although, as we have seen, the burden was upon plaintiff in error to show payment, and, upon this branch of the case, payment in warrants free from the objection of having been issued "in aid of rebellion," yet it failed to do so (Record, pp. 177, 178, 185, 187).

The case, however, having been decided upon the single ground that all warrants in which payments were made (Record, p. 214) were utterly void, having been issued and

intended to circulate as money, it was unnecessary for the court to consider this last feature of the question of payment.

In this state of case it is insisted by the plaintiff in error that if the laws in question were unconstitutional and the payments in warrants were wholly unauthorized, the State is nevertheless not entitled to recover, because the contracts were *executed and completed* and the State and the railway companies were *in pari delicto*.

The answer to this is thus briefly but strongly put by Chief Justice Fisher, of the court of civil appeals, in rendering the opinion of that court:

"It is contended by appellant that if it should be held that the warrants in which the payments were made were illegal, that the State, through its officers, by authority of an act of the legislature having received the warrants as payments, the State was *in pari delicto* as to these payments; consequently she could not urge their invalidity. The legislature, in the exercise of its functions like other members of the official family of the government, must confine its acts within the constitutional limits that circumscribe its powers, and when it performs acts in violation of an express command of the constitution no more validity and life can be given to such acts because of the fact that it may be one of the agents of the government highest in authority than would be given to acts of minor agents of the State.

"The legislative department of the Government, in the exercise of its high functions in creating laws to govern the conduct of other departments of the Government, has no greater power by an unconstitutional law to bind the State than would be the case of an unauthorized or illegal act of an officer in some other branch of the public service. The doctrine of *in pari delicto* can have no application to the State in its sovereign capacity when the act out of which it springs is prohibited by the constitution. In such a case the act prohibited would be beyond the scope of the authority of any and all of the agents of the State from the highest and most exalted departments of the government to the lowest official who may represent it. If such was not the rule, the constitutional inhibition would in

effect be a dead letter upon the books, for it would permit parties who had pretended rights founded upon such illegal and prohibited acts to escape the effect of the offense denounced by the constitution, whenever they reached the point that they had actually violated it, by reaping the benefits of the unauthorized act."

The vice in the contention of plaintiff in error is the unsoundness of the premises. The *State* made no contract with the companies to receive warrants in payment of this debt and necessarily has executed no such contract. "A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and *limited by a written constitution* and established by the consent of the governed," and there is a plain distinction "between a State and the government of a State," said this court, in *Texas vs. White* (7 Wall., 721).

"In the discussion of such questions the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The constitution of the State is the limit of the authority of *its* government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State, as was said in *Langford vs. United States*, 101 U. S., 341, that the maxim that the King can do no wrong, has no place in our system of government; yet, it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and

not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name."

Virginia Coupon Cases, 114 U. S., 290.

"Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of its fundamental law, and must be looked upon, *in all courts of justice, as if it were not and never had been*," else "of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them?"

Virginia Coupon Cases, 114 U. S., 293, 291.

The principle thus announced in the Virginia cases that when the legislature or State officers proceed in violation of the State or National Constitution they do not act for the State is now the accepted doctrine of this court.

Pennoyer *vs.* McGaughey, 140 U. S., 1.
In re Tyler, 149 U. S., 190, 191.
Reagan *vs.* Trust Company, 154 U. S., 389.
Scott *vs.* Donald, 165 U. S., 67.
Smyth *vs.* Ames, 169 U. S., 519.

Argument and amplification on my part would be superfluous. The opinions in these cases explore all the fields of illustration and sound all the depths of reason. If they stand, this judgment must stand; if it falls and the contrary doctrine takes root, constitutional inhibitions and guarantees will become the playthings of the ignorant or

lawless or corrupt; for it will be a declaration that they may be safely disregarded if it be done *fully and completely*.

For the reasons announced in the cases cited, as well as upon grounds of public policy, the doctrines of *estoppel*, *ultra vires*, and *in pari delicto* have no application to governments, particularly when the act is prohibited by organic law. In a case much relied upon by the plaintiff in error in the State courts, and which will probably be cited in its brief, this is plainly recognized, where the court said:

"The State is not in tutelage as one incapable of acting *sui juris*, but has capacity to act in all matters by its representatives and agents, and is bound by the acts and admissions of its duly appointed and recognized officers and representatives, *acting within the general scope of their constitutional powers*."

People *vs.* Stephens, 71 N. Y., 550.

In the familiar case of *Texas vs. White*, 7 Wall., 700, a plea of *estoppel* was interposed (pages 709, 710), and while not specially considered in the opinion, it was necessarily denied by the decree which was rendered. These doctrines in their application to municipal and other like public corporations were considered in *Thomas vs. City of Richmond*, 12 Wall., 349, 356, 357, where no constitutional provision was involved, and denied, the court declaring:

"But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third persons. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and

should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a *matter of public policy* in which the whole community is concerned. And those who aid in such transactions must do so at their peril."

With the exception of the special act of August 15, 1870, the reprehensible and unconstitutional character of which has been shown, and which has been ignored by the authorities, the State has acted upon these principles since the pretended payments were made. At an early day, namely, April 2, 1866, within less than a year after the last payment in warrants (Sayles' Constitutions, 325, 331, 333, 334) and, under the circumstances of disorder and revolution, within a reasonable time, the transaction was repudiated by a State constitution. The companies were put upon notice that the unconstitutional acts of the agents and officers were disavowed, and the situation in which the companies now find themselves was assumed and maintained with this knowledge. Going even beyond this, the State, though confident of her position that the warrants were utterly void and incapable of acknowledgment, ratification, or payment under the Constitution, suggested in the pleadings (Record, p. 42) that the utmost plaintiff in error could claim as a credit was the cash value of the warrants at the time of payment. But this was declined by the company, as it offered no proof of value and did not insist upon such credit. Nor was the State compelled to return the warrants or pay their cash value before instituting this suit (Borden *vs.* Houston, 2 Texas, 611; Bates *vs.* Republic, 2 Texas, 618; Randolph *vs.* State, 73 Texas, 170; United States *vs.* Coal Co., 137 U. S., 170), for it will be conclusively presumed by the courts that she will do justice under the decision.

CHARLES A. CULBERSON,
Of Counsel for Defendant in Error.

No. 81.

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Clerk.

THE TEXAS SCHOOL FUND CASE.

Reply Brf. of Culberson for D.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Dec. 12, 1899.

No. 81.

THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

REPLY ARGUMENT FOR DEFENDANT IN ERROR.

CHARLES A. CULBERSON,
Of Counsel for Defendant in Error.

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REPLY ARGUMENT FOR DEFENDANT IN ERROR.

The brief of plaintiff in error was not filed until December 1st, and consequently there is not time for more than a short and hurried answer to such points to which it is thought proper to reply.

FIRST.

In my former argument it was shown that the State, ignoring the alleged payments as absolute nullities which need not first be set aside as part of her cause of action, declared on the bonds and for the balance due. When part payment in *valid* warrants was expressly and exhaustively

pleaded by plaintiff in error, the State replied to this defense to the effect, among other grounds, that the warrants were void as bills of credit issued in violation of the Constitution of the United States.

At page 46 of the brief of plaintiff in error it is said: "The first supplemental petition of plaintiff was not a reply to the answer of defendant. In the first place, no reply is required by the statutes of Texas," quoting article 1193 of the Revised Statutes of Texas.

Abandoning this position, it is said at pages 50 and 51 of the brief:

"The evidence afforded by the State's own books was also free from taint; hence, if the State, standing upon its original petition, had offered evidence to show that the warrants used in making the payments were, in form or otherwise, illegal as bills of credit—emitted contrary to the Constitution of the United States—an objection would have lain thereto upon the ground that the fact thus sought to be established had not been pleaded. It was therefore essential to recovery by the State that the right it relied upon under the Federal Constitution to avoid these payments should be pleaded in order to admit proof of the same, and that pleading and proof of the right claimed under the Federal Constitution was as much a part of the State's case as the existence of the indebtedness in the first instance."

Counsel are mistaken in declaring that the "evidence afforded by the State's own books was also free from taint." It is expressly alleged in the answer (Record, p. 17, paragraph 17) that the account on the books of the comptroller's office had been restated so as to exclude payments made in warrants, making the account as declared on in the original petition. It would therefore have been legal to have offered this account in evidence and it would have established the case of the State without affirmatively overthrowing the alleged payments. The transcripts from the books of the comptroller's office introduced by the defendant

(Record, p. 115 *et seq.*) were only skeletons from the books. It has been shown in the former argument, it is submitted, that payment was the affirmative defense of defendant, necessary to have been pleaded and established. Further than this, it was not incumbent upon the State to reply to the plea of payment, though doing so did not militate against this view, for it was *an answer to a defense, and no part of the cause of action*, but the burden was upon the defendant to establish *legal* payment in warrants, and the State, without further pleading than the original petition, could have introduced proof showing, or tending to show, that such legal payment had not been made.

Rev. Stats. Texas, art. 1193.
Meyer *vs.* Opperman, 76 Texas, 108.
R. R. Co. *vs.* Mitchell, 78 Texas, 64.
Morris *vs.* Casling, 79 Texas, 141.

There is a distinction between payment direct, in money, and payment as a conclusion of law from a certain state of facts, such as that relied upon in this case. In the first case a simple plea will suffice, but in the other case the facts constituting payment should be specially alleged, and of course, appropriate rebutting proof may be offered in each case. This distinction was drawn in an early day by the supreme court of Texas:

"I apprehend, however, that if the payment had been direct, in money, at the time stated in the plea, to the legal holder of the note, such fact could have been given in evidence under the plea of payment, as pleaded. If the payment, however, was a conclusion of law from a certain state of facts, then those facts, it seems, should be specially alleged in the plea."

Holliman *vs.* Rogers, 6 Texas, 91.

Necessarily when such facts are specially alleged rebutting proof may be offered under the Texas statute without specially denying or replying thereto. In this case the de-

fendant pleaded the facts constituting payment, and in its answer, as it was bound to do, alleged and undertook to prove that the *warrants were valid.* In paragraph 7 of the answer it is alleged that the State "had then outstanding its *valid obligations* in the form and of the character of warrants drawn by its comptroller on the State treasury for claims and demands against the State," which could not be paid for lack of funds; that then, for the purpose of aiding in maintaining the public credit, the act of December 16, 1863, was passed, and that "under like circumstances and for the same object" the acts of May 28, 1864, and November 15, 1864, were enacted. In paragraph 8 it is alleged that defendant acquired the "so-called treasury warrants," intending to pay and tender to the comptroller in payment of the interest and principal of the special school fund, and by paragraph 9 that they were paid to and accepted by the comptroller.

Record, pp. 9, 10, 11.

These allegations of the validity of the warrants carried with them by necessary implication the validity of the laws under which they were issued, but defendant went beyond this in its answer, as it was proper to do, and asserted and undertook to establish the validity of the laws of 1861, 1863, and 1864 authorizing payment in warrants. In paragraph 11 it is alleged:

"This defendant further says that the said treasury warrants paid by said railway companies, as hereinbefore alleged, on account of the principal and interest due by them respectively, on their said indebtedness to the State of Texas for said school-fund loan, were made by them in good faith and accepted by the said State through its duly authorized officers without objection as valid and lawful payments, and for which said railway companies were entitled and for which they were given credit upon the books of the State of Texas, *in pursuance of valid laws passed by said State in the exercise of its sov-*

ereign power and as then actually in force and observed in Texas."

Record, p. 13.

To the same effect is paragraph 22 of the answer.

Record, p. 20.

The first supplemental petition of the State was consequently but an acceptance of the issue tendered by the company, that the payments were made in valid treasury warrants, issued under valid and binding laws, and necessarily the burden remained upon the company.

SECOND.

Beginning at page 68 of the brief, it is attempted to be shown that this court should construe the alleged contract to accept warrants in payment of this indebtedness. Preliminary to the discussion, it is said at page 70 that "from the beginning of this litigation we have maintained that the obligation of the contracts arising in the manner indicated was impaired by the act of August 13, 1870." As the directly contrary statement is made in my former argument, it is well to understand the record at the outset of what may be said here.

In paragraph 14 of the answer the act of August 13, 1870, is referred to for the first time, and an examination will show (Record, p. 15) that the law is merely described in general terms, and it is not alleged or intimated that it impaired the obligation of any contract. The next place in which this act is alluded to in the answer is in paragraph 17 (Record, p. 17). It is there referred to in connection with the special law of August 15, 1870, and the action of the comptroller in restating the account, but it is not averred directly or indirectly that the restatement of the account was made pursuant to the act of August 13, 1870, or a construction thereof by the comptroller. On the contrary, it is

declared that the comptroller acted "wrongfully and without any authority of law." The only other reference to this act in the answer is in paragraph 23, as follows:

"This defendant further says that by the passage of the acts hereinbefore referred to, and especially by the passage of the act entitled 'An act authorizing the comptroller of the State to receive from the railroad companies in the State the interest that may now be due on their bonds,' approved December 16th, 1863, and an act entitled 'An act amending an act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due or hereafter become due on their bonds,' approved May 28th, 1864, and an act entitled 'An act authorizing railroad companies to discharge their indebtedness to the special school fund with the treasury warrants and bonds and coupons of the State,' approved November 16th, 1864, and an act entitled 'An act for the relief of railroad companies indebted to the State for loans from the special school fund,' *approved August 13th*, 1870, and an act entitled 'An act for the relief of the Houston & Texas Central Railway Company,' passed August 15th, 1870, and by the acceptance of the provisions of said act by said Houston & Texas Central Railway Company and by said Washington County Railroad Company, and especially by accepting the treasury warrants of the State in payment of freight and passenger fares on their respective railroads at par with specie, as required by the aforesaid acts of May 28th, 1864, and November 15th, 1864, *there was created a valid and binding contract by and between the State of Texas, inuring to the benefit of this defendant, as the successor of said companies.*"

Record, p. 21.

In a printed argument filed in this case in the court of civil appeals by the law firm of Baker, Botts, Baker & Lovett, of which R. S. Lovett, of counsel for plaintiff in error, is a member, and who testified on the trial that he had special charge of the case in the State courts (Record, p. 185), it was insisted that the act of August 13, 1870, rati-

fied and approved the payments in question. At pages 93 to 99 it is said:

"The general act entitled 'An act for the relief of railroad companies indebted to the State for loans from the special school fund,' approved August 13th, 1870 (Gen. Laws, Called Ses., 1870, p. 85), under which all subsequent payments have been made, and on which the State, in her petition in this case, relies, clearly recognized the validity of the payments in question. That act required railroad companies indebted to the special school fund to pay on the first day of November, 1870, six months' interest 'on the aggregate amount due on account of said loans, principal and interest, *as said aggregate amount stood on the first day of May, A. D.* 1870,' and in addition one per cent. upon said aggregate amount to be applied toward the sinking fund, etc., and should thereafter pay into the treasury of the State six months' interest and one per cent. on account of the sinking fund, semi-annually, on the first day of May and November in each year. The same provision was contained in section 2 of the special act entitled 'An act supplementary to the act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company and to the other special acts relating to said company,' approved July 27th, 1870 (Special Laws, 1870, p. 45). At the time these acts were passed the facts in reference to these payments were fresh in the legislative and public minds. The representatives of the State and the agents of the railway company who conducted the transaction and all the witnesses were then living. They are now dead (Trans., p. 310). It was then known, or could have been ascertained, what kind of warrants were used—whether legal or illegal. If the State had any ground upon which to avoid these payments, if it could avoid them, the facts were known then, and then was the time when the attempt should have been made. Instead of this the legislature passed the acts referred to without the slightest indication of an intention to repudiate these payments or to question them in any way, and considering the conditions then existing, and with all the facts before it, adopted the standing of the accounts on the first day of May, 1870, as the true balance and as the basis for all future payments. It took 'the aggregate amount due on account of said loans, principal and in-

terest, as such aggregate amount stood on the first day of May, A. D. 1870,' as the true amount of the indebtedness. The 'aggregate amount' referred to 'as said aggregate amount stood' on the date named, must have been, it seems to us, beyond question the aggregate amount as it appeared upon the books of this State. There had been various payments from time to time since the loans were made. Some were unquestionably valid, and some were disputed by certain officers of the State. The act was obviously designed as a compromise or settlement as of that date. The standing of the account on the first day of May, 1870, was therefore taken as the basis, and a new arrangement was made by which the debt was to be liquidated in the future. It is unreasonable to suppose that the legislature had reference to the standing of the account elsewhere than as it stood upon the State's books. These books then showed, as appears without dispute, that credit had been duly given for the payments in warrants, and had not then been recharged or canceled on the books." * * *

"It being an indisputable fact that the amount of the indebtedness as it stood on the first day of May, 1870, was the balance due as claimed by appellant, after allowing credit for the payments in warrants, we earnestly insist that the act of August 13th, 1870, above referred to, was an express recognition by the legislature of such payments, and a declaration that they schould not be demanded again, but that the State would accept the balance then existing as the true amount of the indebtedness and as the basis for all future payments required under that act. As said before, the legislature was cognizant of the facts and circumstances attending such payments, and must then have repudiated them if it had intended to do so at all, and the fact that it did not in any way question them, but adopted a basis including them, seems to us to admit of no doubt that the legislature recognized their validity and intended by taking the basis stated to waive all question respecting them in the future. We think, moreover, that the fact that the legislature took the standing of the account on May 1st instead of on the date of the passage of the act is very significant as indicative of such intent. The disposition of certain State officers with reference to these payments was, of course, known to the legisla-

ture. It was doubtless considered by the legislature that if any later or uncertain date should be taken these officers would recharge these items, or take some action with reference to the account that would defeat the purpose, or that probably an effort had already been made, subsequent to May 1st, to recharge the items. Therefore, the legislature, looking to the accounts as they stood on the 1st day of May, adopted them as of that date so as to prevent the comptroller or other officer from defeating the will and purpose of the legislature to recognize these payments."

It is clear, therefore, that the basis of the argument of plaintiff in error is unsound, for instead of impairing the obligation of the contract, this act is alleged to be an element of the contract. And the argument is itself unsupported by authority. The Constitution of the United States declares that "no State shall * * * pass any * * * law impairing the obligation of contracts." As an original proposition, to give this court jurisdiction upon the ground that a Federal question is involved under this clause of the Constitution some law of the State must be passed impairing the obligation of the contract, and necessarily the contract must be an existing one and the law must be enacted *subsequent* thereto; and under section 709 effect must be given to the subsequent law by the State court by a decision in favor of its validity. The only law, statutory or constitutional, which counsel urge as impairing the obligation of the contract in this case, in their brief (pp. 249, 250), is the act of August 13, 1870. We have seen, however, that by the answer it is insisted that this was part of the contract and therefore did not impair its obligation. It also appears from the opinion of the court of civil appeals that the decision was not in favor of the validity of this statute of 1870. On the other hand, in so far as any decision upon it was made, it was *against* its validity, as confirming and ratifying the payments. But pursuing the

argument that this court will not pass upon the contract unless the decision of the State court gave effect to this subsequent law, the proposition is thoroughly supported by the decisions. Many cases are cited in the brief as holding the contrary, but an examination of them will show, whatever the language employed, that the *decisions* accord with this rule. If, however, any of them are not in harmony with our contention, they are controlled by the later cases. The case of *Bacon vs. Texas*, 163 U. S., 207, cited in my former argument, where the rule was distinctly stated, has been approved or the principle re-announced in the following cases:

Douglas *vs.* Kentucky, 168 U. S., 502.
R. R. Co. *vs.* Nebraska, 170 U. S., 68.
Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 9.
McCullough *vs.* Virginia, 172 U. S., 116, 122.
Water Power Co. *vs.* Street Railway Co., 172 U. S., 485, 486.
Turner *vs.* County Commissioners, 173 U. S., 463.

THIRD.

In stating the alleged contract, it is said at page 88 of the brief:

"Upon an accumulation from time to time of State warrants received by them, the railroad companies paid and delivered them to the comptroller of the State of Texas on account of the interest due upon the school-fund loans."

Taken in connection with what precedes it, this is a statement that the companies received the warrants at par with specie for freight and passage upon their lines and paid the same warrants to the comptroller on their indebtedness. This is an entirely erroneous statement. It is alleged in paragraph 8 of the answer that the companies "acquired for valuable and adequate considerations the so-

called treasury warrants," and in paragraph 9 "that having acquired the same for a valuable consideration, as hereinbefore recited," said companies paid warrants to the comptroller. The same general allegation of acquisition of said warrants for valuable considerations appears elsewhere in the answer, and it is averred that warrants were received at par for freight and passage, but it is nowhere alleged in direct terms that the warrants so received for freight and passage were those paid to the comptroller.

Record, pp. 10, 11, 12.

It was not until the passage of the act of May 28, 1864, that railway companies were required to receive treasury warrants at par for freight and passage over their lines, in order to authorize payment of their indebtedness to the school fund in warrants, and the sum of $49,146.68 was paid *in warrants prior to the passage of this act.*

Record, pp. 11, 116.

There was not a syllable of testimony showing that any warrants received for freight and passage at par were paid on this indebtedness.

With reference to the contention, beginning at page 113 of the brief, that there was no evidence showing whether the warrants used in making payments were issued before or during the war, the court of civil appeals found as a fact (Record, p. 214) that they were issued *after* they were intended to circulate as money, and all of them were void, whether issued for civil or military purposes.

FOURTH.

It is insisted in the brief, beginning at page 198, that the act of August 13, 1870, impaired the obligation of the alleged contract between the State and the companies arising under the acts of 1861, 1863, and 1864. In the second para-

graph of this argument it has been shown (1) that the company, in its answer, alleged that this law was part of its contract, and its validity therefore was not drawn in question, and (2) that the court of civil appeals did not, in its decision, give effect thereto, but in the only phase in which it was considered, to wit, as confirming the contract, the decision was against its validity. Counsel for plaintiff in error, both in the brief and argument, in order to present a case within the jurisdiction of this court, run counter to their pleadings on this subject. The particulars in which this is done in the brief have been pointed out. In his printed argument, at page 14, Mr. Carlisle, referring to the act of August 13, 1870, says:

"The purpose of the legislature in requiring the amount of the debt and interest to be ascertained according to the accounts as they stood on the first day of May, 1870, was to ratify the cancellation of the credits which had been made by the officials on or prior to that date."

This is not only at variance with the pleadings as heretofore pointed out, but also in the particular that it is expressly alleged in the answer (Record, p. 17) that this restatement of the account and cancellation of credits occurred November 1, 1870, after the passage of the act; so, according to their own case, no such purpose could have actuated the legislature. The record does not show that in restating the account the comptroller acted upon the law of 1870; but if such were the case, and other essentials appeared, this court would still be without jurisdiction, because it is the effect given by the highest court of the State, and not executive officers, which will be regarded in this action.

FIFTH.

There are several minor suggestions which appear at various places in the brief deserving of notice. It is intimated that when the facts were fresh in mind and the actors in the transaction were living the State should have proceeded. I have shown that, commencing with the constitutional convention of 1866, these payments have been consistently and continuously disavowed, except in one instance. The companies, granted favors and extensions by the acts of November 10, 1866, and August 13, 1870, because of the paralysis of business, have regularly paid the sums demanded by the State under those laws, and no cause of action accrued until 1894, upon which this suit was promptly instituted. Whatever delay has occurred the companies are responsible for. It is not true, as charged in the answer, that they were forced into accepting the acts of 1866 and 1870 by threats of the Governor, and have continued in coercion since then because of intimidation of his successors. Proof of this was challenged on the trial, and there is not a line to question the contrary finding of the trial judge.

Record, pp. 69, 71.

Nor is this a case where the companies were driven to the use of paper currency by revolutionary and irresistible forces. It was optional with them, the use of the warrants was voluntary, and for a double reason, in the language of this court, "those who aid in such transactions must do so at their peril."

CHARLES A. CULBERSON,
Of Counsel for Defendant in Error.

NOTE.—What is said in this and the former argument in reference to the act of August 13, 1870, applies also in cause

No. 82. The allegations of the answer and the argument in the court of civil appeals with regard to this law and the impairment of the contract were the same in the two cases. The provisions of the special act of July 27, 1870, applicable only in No. 82, are the same as the act of August 13, 1870, in so far as the account of the indebtedness is concerned.

No. .....

In the Supreme Court of the United States,

October Term 18....

THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION TO DISMISS WRIT OF ERROR.

This suit was instituted by the State of Texas through its attorney-general in the district court of Travis county, Texas, on the 5th day of December, 1894, alleging substantially the following facts:

1st. That the defendant company is incorporated under the general laws of the State of Texas.

2nd. Its general office and principal place of business is at Houston, Texas.

3rd. Its line of railroad runs into and through the county of Travis in the State of Texas.

4th. Its local agent at Austin, in said county, is H. D. Patrick.

5th. The State of Texas made loans under the provisions of an act entitled "An act to provide for the investment of the

special school fund in the bonds of railroads incorporated by the State," approved August 12th, 1856, to the Houston and Texas Central Railway Company, as follows:

On April 13, 1857, one hundred and fifty thousand dollars;
On October 28, 1857, sixty thousand dollars;
On May 21, 1858, sixty thousand dollars;
On July 6, 1858, thirty thousand dollars;
On February 23, 1859, thirty thousand dollars;
On June 15, 1859, thirty thousand dollars;
On July 22, 1859, thirty thousand dollars;
On August 2, 1859, thirty thousand dollars;
On August 20, 1859, thirty thousand dollars;

and said company executed, delivered to the State of Texas, in consideration of said loans, bonds as follows:

One dated March 25, 1857, for one hundred and fifty thousand dollars;
One dated September 22, 1857, for sixty thousand dollars;
One dated January 28, 1858, for thirty thousand dollars;
One dated February 23, 1858, for thirty thousand dollars;
One dated February 23, 1858, for thirty thousand dollars;
One dated January 25, 1859, for thirty thousand dollars;
One dated May 14, 1859, for thirty thousand dollars;
One dated ...., 1859, for thirty thousand dollars;
One dated June 2, 1859, for thirty thousand dollars;
One dated July 29, 1859, for thirty thousand dollars;

said bonds being to the effect that said company would pay to the State of Texas, at the office of its treasurer in the city of Austin, ten years from the respective dates of said bonds, the said several sums of money, would pay each year two per cent of said several sums as sinking fund, and would pay interest on each of them at the rate of six per cent per annum, and said bonds expressly acknowledging the lien created by the act aforesaid to secure payment of loans made thereon.

By the loans aforesaid, and by the execution of said bonds, the said company became liable to pay, at the dates severally indicated, the several sums of money (principal, interest and sinking fund) mentioned, and the State, to secure payment of said sums, became thereby invested with the lien aforesaid.

6th. The State of Texas made, under the provisions of the act aforesaid, and of an act approved January 28th, 1856, a loan to the Washington County Railroad Company on June 29th, 1859, of sixty-six thousand dollars, and in consideration thereof the said company executed to the State its bond dated June 6th, 1859, to the effect that it would, ten years after the date thereof, pay to the State, at Austin, Texas, said sum, would pay, annually, two per cent thereof as a sinking fund, and would pay intesest thereon at the rate of six per cent per annum, and acknowledging the lien created by the act aforesaid.

By the said loan and the bond aforesaid, the said company promised and became liable to pay the same sum at the time indicated and the said sinking fund and interest, and the State became invested with the lien aforesaid.

7th. That on or before the 15th day of August, A. D. 1870, The Washington County Railway became consolidated with and merged into the Houston and Texas Central Railway, and said Houston and Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railway Company.

8th. That the bonds aforesaid were not paid according to their tenor and effect, and the property upon which the lien aforesaid attached became liable to sale.

9th. That prior to the 15th day of August, 1870, the Houston and Texas Central Railway Company had constructed on its main line railroad as follows: A line of railroad completely constructed, beginning at the original terminus of said road, on the left bank of Buffalo Bayou, in the city of Houston, in Harris county, Texas, and running thence, in a general northwesterly direction, through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls and Limestone, including the 1st, 2nd, 3rd, 4th, 5th and 6th sections of twenty-five miles each, to a point one hundred and fifty miles to the place of beginning, about three miles south of Kosse, in Limestone county.

10th. That prior to the 15th day of August, 1870, the Washington County Railway Company, and the Houston and Texas Central Railway Company, had constructed of what is now known as the Western Branch of the Houston and Texas Central Railroad as follows: A line of railroad beginning at the point

of junction of said Western Branch with the track of the main line of the Houston and Texas Central Railroad in the town of Hempstead, in Waller county; thence in a general westerly direction, through Waller and Washington counties for about twenty-one and one-quarter miles to a point in the town of Brenham, in Washington county.

11th. That under the terms of the said act of August 13th, 1856, and under the terms of the bonds aforesaid, a lien to secure payment of the said bonds attached to all of said road, viz: said one-hundred and fifty miles of the main line of the Houston and Texas Central Railway, and twenty-one and one-quarter miles of the Western Branch thereof, and to all charter rights of said company or companies, including the road-bed, right of way, grading, bridges, iron rails, equipments and masonry, and to all stock subscribed for in said company or companies, and upon all depots and depot stations, all the property owned by said company or companies as necessary for their business.

12th. That on the first day of May, 1870, the aggregate amount due upon the bonds executed by the Houston and Texas Central Railway Company, principal and interest, was the sum of Six Hundred and Fifty-seven Thousand, Three Hundred and Twenty-four and 35-100ths Dollars ($657,324.35).

13th. That on the 1st day of May, 1870, the aggregate amount due upon the bonds executed by the Washington County Railway Company, principal and interest, was the sum of One Hundred and Three Thousand, Eight Hundred and Forty and 1-100ths Dollars ($103,840.01).

14th. That the Houston and Texas Central Railway Company accepted the terms of the act of August 13th, 1870, entitled "An act for the relief of railroad companies indebted to the State for loans from the school fund," and thereby promised and became liable to pay, in addition to said sum of $657,324.35, and said sum of $103,840.01, semi-annually, on the 1st day of November and the 1st day of May of each year, six months' interest at six per cent per annum on said aggregate amounts, and in addition thereto on said dates, a sinking fund of one per cent of said amounts, in consideration of which promises the State by the terms of said law agreed not to

make sale of the property upon which its lien existed as long as said payments were made.

15th. That thereafter to May 1st, 1879, said semi-annual interest and sinking fund was paid by the Houston and Texas Central Railway Company upon said sum of $103,840.01; but that no payment of principal or interest was made on November 1st, 1879, nor within ten days thereafter, nor has any such payment been since made, and upon said failure to pay within ten days after the 1st day of November. A. D. 1879, the entire balance then remaining unpaid of said sum, amounting to $86,-655.90, became at once due and payable.

16th. That up to and including the 1st day of May, 1893, the said semi-annual interest and one per cent sinking fund was paid by said Houston and Texas Railway Company and defendant upon said sum of $657,324.35, but the next semi-annual interest and sinking fund was not paid, but the sum of $2,620 only was paid; the balance thereof was not paid, nor has it, or any part of it, since been paid; and upon said failure to pay within ten days after the 1st day of November, A. D. 1893, the entire balance of $411,935.84, remaining then unpaid of said sum of $657,324.35, became at once due and payable.

17th. That upon said sum of $86,655.90, there has become due each six months from said 1st day of May, 1879, up to the present time semi-annual interest at the rate of six per cent per annum, and there is due upon each of said installments of unpaid interest, interest from the date upon which they respectively became due at the rate up to July 1st, 1891, of eight per cent, and since then of six per cent.

18th. That upon said sum of $411,935.84, there has become due upon May 1st, 1894, semi-annual interest at the rate of six per cent per annum, and upon November 1, 1894, a like amount, and since those dates upon said unpaid installments of interest at six per cent.

19th. That upon the 1st day of July, A. D. 1886, all the property of the Houston and Texas Central Railway Company, including the property upon which the State has the lien aforesaid, was sold judicially, and the purchaser and his associates formed under the laws of this State the corporation herein styled defendant.

20th. That said Washington County and Houston and Texas Central Railway Companies are defunct; that their corporate existence has been terminated; that neither of them has a president, directors, or other officers or stockholders, or other representatives, upon whom service may be had, and that there is no way of bringing said defunct corporations before this court.

21st. That the Houston and Texas Central Railroad Company, defendant, claims as the legal owner (subject to the lien heretofore mentioned) and is in possession of all the property upon which the lien above set forth exists.

22nd. Plaintiff prays that judgment be given it that there is due upon the obligations aforesaid the sums of money heretofore stated with interest as set forth, and that payment thereof is secured by the liens on the property aforesaid; that said property be sold as under execution, and that the proceeds be applied to the payment of said sums with interest, and for costs; and that it have other relief, including the appointment of a receiver, as in the premises should be given."

To this defendant answered on the 6th day of February, 1895, and on May 15th, 1895, filed its first amended original answer, setting up the payment of certain amounts during the war between the States, in State treasury warrants, in addition to certain large cash payments therein pleaded.

On November 16th, 1895, appellee filed its first supplemental petition. This was subsequently amended on the 16th day of January, 1896. The amended supplemental petition consisted of demurrers and appeal plea, setting up—

1. That the money borrowed by the railroad company constituted a part of the special school fund of the State of Texas, which had been previously appropriated as a permanent fund for the support of the public free schools, and that to permit these payments in worthless warrants, or anything else than money, would be a diversion of that school fund, and was therefore in contravention of Sec. 2, Art. X, of the Constitution of 1845, and as amended in 1861.

2. That the treasury warrants so issued were issued for the purpose of being circulated as money, and that they were so circulated and used by the State officers; that they were there-

fore void because in contravention of Sec. 8, Art. VII, of the Constitution of the State of Texas then in existence.

3. Because the said warrants so issued constituted bills of credit, within the meaning of Section 10, Article I, of the Constitution of the United States; and they were therefore void because said section of the Constitution prohibited their issuance by the States.

4. Because the acts of the Legislature authorizing the issuance of said treasury warrants, and the history of the times, show that they were issued for the purpose of aiding the then authorities of the State of Texas in prosecuting a war and rebellion against the government of the United States; and that they were issued for the purpose of aiding the State in prosecuting said war and rebellion.

5. Because the people in the Constitutional Convention, assembled in 1866, by ordinance, declared all said warrants in which said pretended payments were made, to be utterly void and of no effect. And further, because Article XII, Section 36, of the Constitution of 1869, reiterated and repeated the same declaration.

6. That said warrants in which said payments were made were utterly worthless.

7. That said payments had been disallowed in 1870 by the then officers of the State, of which defendant had ample notice.

Plaintiff prayed that no credit be allowed by reason of the payments in said warrants, and if allowed, that they be allowed only to the extent of the market value of said warrants when paid to the State. (Tr., p.)

On the 16th of November, 1895, defendant filed his application, accompanied by bond, for the removal of the cause into the Circuit Court of the United States for the Western District of Texas, alleging in substance that the cause of action was one arising under the Constitution and laws of the United States. The application was denied. (Tr., p.)

All of the demurrers were overruled by the court, the case tried, and resulted in a judgment for the plaintiff for the sum of $673,109.56, together with all costs of suit, and with a foreclosure of the lien mentioned in the petition, upon all of the property of the defendant. (Tr., p.)

STATEMENT OF UNCONTESTED FACTS.

As is shown by the statement of uncontested facts in appellant's brief, the following facts were established on the trial of the case:

1st. It was admitted by the defendant that the State of Texas made to the Houston and Texas Central Railway Company, and to the Washington County Railroad Company respectively, under the provisions of the act entitled "An act to provide for the investment of the special school fund in bonds of railroads incorporated by the State," and approved August 13th, 1856, loans in the amount, and at the dates set forth in plaintiff's original petition, and that said companies executed and delivered to the State of Texas on the dates and in the amounts set forth in said petition, the bonds described in the petition, in consideration of said loans.

2nd. It was admitted also that on or about the 15th day of August, 1870, the Washington County Railroad Company became consolidated with and merged into the Houston and Texas Central Railway Company, and that the said Houston and Texas Central Railway Company thereafter had possession of and claimed the property which had theretofore belonged to the Washington County Railroad Company. (Tr., pp. .)

3rd. It was also shown that the appellant, the Houston and Texas Central Railroad Company, was incorporated under the general laws of the State of Texas by filing articles of incorporation in the office of the Secretary of State on the 1st day of August, 1889, by F. P. Olcott and his associates, the purchasers of the railroad and corporate rights and franchises of the Houston and Texas Central Railway Company, including the Washington County Railroad, at the judicial sale thereof. (Tr., pp. .)

4th. It was also admitted in connection with the introduction of the articles of incorporation of the defendant company that said company has been organized and existing under and by virtue of such articles of incorporation now and at the time of the institution of this suit, was in possession and claiming by proper deeds of conveyance from F. P. Olcott, and on such

charter owned and operated the railroad and property described in plaintiff's original petition.

5th. It was also admitted by defendant in open court that all payments made on account of the loan to the Washington County Railroad Company after that company was merged into the Houston and Texas Central Railway Company in 1870, up to the time that such payments on account of the loan to the Washington County Railroad Company were discontinued in 1879, were made by the Houston and Texas Central Railroad Company, and that all payments on account of the loan to the Houston and Texas Central Railway Company that were made after February, 1885, and prior to April, 1893, were made by the receiver of the property and affairs of said railway company; and that all the payments on account of said loan paid subsequent to April 1st, 1893, were made by the Houston and Texas Central Railroad Company, the defendant in this case.

6th. It was shown, as stated by appellant in his brief, that the payments made in the treasury warrants as averred by it, were aocepted by the comptroller and treasurer of the State, and that credit was at the time duly given by the comptroller on the books of his department; but in that connection it should be stated that said credits were soon thereafter repudiated, and that the State authorities have never since admitted that they were proper credits, but on the contrary have insisted that said payments were void, and should be disregarded. (Tr., p. .)

7th. It was also shown that the Washington County Railroad Company had no officers, and no one upon whom service could be had. (Tr., p. 230.)

8th. It was also shown that all of the property of the Washington County Railroad Company after it had been merged into the Houston and Texas Central Railway Company in 1870, was operated by the latter company until its property and affairs had passed into the hands of a receiver in 1885; and it was operated by said receivers until April 10th, 1893, and passed with the other lines of the Houston and Texas Central Railway Company to F. P. Olcott, by a foreclosure sale in 1888, and from Olcott to this defendant, organized and incor-

porated under articles of incorporation filed August 1st, 1889. (Tr., p. .)

9th. It was also proven that the governor had given authority to the attorney general to institute this suit. (Tr. p. .)

The defendant in the court below pleaded various payments in cash and also certain payments made in treasury warrants alleged to have been issued by the State of Texas. The facts charged in the original petition, that is to say the lending of the money and the execution of the bonds, were admitted by the defendant. (See Rec. p. .)

There was no contest made over the cash payments and indeed there was no contest over the fact of the delivery of the treasury warrants to the proper officers of the State, as alleged in the defendant's answer, but the State by a supplemental petition charged that these warrants were void for various reasons.

FIRST, *Because issued for the purpose of being circulated as money in contravention of Section 8, Article VII, of the State Constitution of 1845. So much thereof as is applicable reads as follows:*

"And in no case shall the Legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." (Sayles' Texas Statutes, Vol. 4, p. 208.)

In 1861, in the effort to make secession successful, the State Constitution was amended so as to conform to the general purpose manifested by the secession convention. In this Constitution, however, Section 8, Article VII, was carried forward without any change. The portion of the section in point of the Constitution as amended in 1861 reads as follows:

"And in no case shall the Legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." (Sayles' Texas Statutes, Vol. 4, p. 245.)

SECOND, *Because they were bills of credit, prohibited by Section 10, Article 1, of the Federal Constitution.*

THIRD, *Because they were issued in aid of the rebellion.*

FOURTH, *Because the railroads were enabled to purchase them*

in the market for a nominal, insignificant and trifling sum, and sought to compel the State to take them at par.

That as soon as peace was restored, the acceptance of these depreciated warrants in payment of debts justly owing by the railroad companies was immediately repudiated by the lawful officers of the State of Texas, and that ever since said date of said repudiation the State has maintained that said payments were illegal and unlawful, of which said fact the defendant company had ample and abundant notice.

On the filing of this supplemental petition, or soon thereafter, the defendant company filed a motion to remove the cause to the Federal Court, accompanied by proper bond. The motion was denied. (Record, p. ——.) Trial resulted in a judgment for the plaintiff in the sum of six hundred seventy-three thousand one hundred and nine dollars and fifty-six cents ($673,109.56), and a foreclosure of the lien on the property of the railroad company. The plaintiff in error company perfected an appeal to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. The case was by that court reformed and affirmed. The Court of Civil Appeals found as a fact that the warrants in which the payments were made were issued during the war and for the purpose of being circulated as money. That tribunal also found that as a matter of law they were void because issued in violation of Section 8, Article VII, of the State Constitution which prohibited warrants being issued for that purpose. That therefore it must be judicially treated as if no warrants had ever been issued at all because a void warrant was equivalent to no warrant, and therefore no warrants were ever paid to the State because void warrants cannot be given any validity. The portion of the opinion of the Court of Civil Appeals dealing with this subject reads as follows:

"The second, and principal question which arises is whether the payments made by the railway company in State treasury warrants are valid and binding upon the State. This question presents really the only controversy between the parties. Section 8, Article 7, of the Constitution of 1845 states that in no case shall the legislature have power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money. The warrants which were

paid upon the obligations due the State were issued under acts of the legislature of the State when that provision of the Constitution was in force. The various acts of the legislature of the State during the period of the war concerning the State revenues, its indebtedness and liabilities, and providing for the issuance of State warrants and the purpose for which they could be used, and the amount for which they could be issued, together with the size, shape and color of the warrants issued, and the small amounts in which warrants were issued, together with the history of the times and the well known depleted condition of the treasury during that period, together with the scarcity of existing, reliable and available circulating medium as money, convinces us that it was the purpose of the various acts of the legislature during that time to give to the warrants issued during that period, as much as possible, a standing and character as money. The scarcity of money and the necessities of the State and the public were evidently inducements to the legislature sitting during this period to provide uses to which warrants might be put in the way of requiring State officers and authorizing railways to receive them in payment of debts due them. The evident purpose was to give to the warrants in certain instances a debt-paying power in order that they might be given an advanced value and might be used in some respects as money. When the warrants were issued it was not expected and intended that they would be immediately paid, for the State was not then in a condition to pay them, nor was the intention solely that they should serve the legal purpose of evidences of debt against the State. But the character of legislation during the period during the war clearly indicates that the purpose was to give to these warrants the added quality of money as far as it lay in the power of the legislature to accomplish that result. To set out all the acts of the legislature bearing upon this subject, together with all the facts which we have considered in connection therewith, with the well known matters of history relating thereto would unnecessarily prolong this opinion. Therefore, we close this branch of the case with the statement that *in our opinion the warrants of the State issued during the period of the war, after January 1, 1862, were intended to be used* and circulated as money, and in this connection it is well to say that we are of the opinion from all there is shown from the record that the payments made by the railway companies upon the obligations sued upon were in warrants issued *after the time we have declared they were intended to circulate as money.* What is said in this connection relieves us from passing upon the interesting questions upon the burden of proof with reference to the alleged payments." (40 S. W. Rep., 1099-1101.)

A writ of error was applied for to the Supreme Court of the State and was refused, and the case was brought to this court by writ of error.

The State of Texas, defendant in error, now therefore, moves this court to dismiss the writ of error for the reason that this court is without jurisdiction to try and determine this cause.

It also prays that notice of this motion be served upon Mr. Joseph Paxton Blair, who resides in the city of New Orleans, State of Louisiana, and Mr. Jas. A. Baker and Mr. R. S. Lovett who reside in the city of Houston, Harris County, Texas, all of whom are counsel of record for the plaintiffs in error in this cause.

M. M. CRANE, Attorney-General,
Counsel for Defendant in Error.

BRIEF AND ARGUMENT ON THE ABOVE MOTION.

FIRST PROPOSITION.

The statement of the plaintiff's claim or cause of action in the original petition disclosing no Federal question, the cause was not removable to the Federal Court.

Statement.—Plaintiff's statement of its cause of action is contained in the original petition. The petition discloses that it was an action for debt created by the lending of money to the railroad companies therein named, which indebtedness was evidenced by bonds fully described therein and to secure which a lien was given upon the property therein described. It was simply a foreclosure proceeding without even the suggestion, remote or otherwise, of a Federal question.

Authorities:

Tennessee vs. Bank, 152 U. S., 464.
Chappell vs. Water-works, 155 U. S., 102.
P. T. C. Company vs. Alabama, 155 U. S., 487.
East Lake Company vs. Brown, 155 U. S., 488.

ARGUMENT.

The Texas courts require the cause of action to be stated in the original petition, or in the amended original petition. De-

fensive matters pleaded by the plaintiff are contained in supplemental petitions. A supplemental petition is, in the strictest sense, a replication, as the following rules prescribed by the Supreme Court of the State, will disclose:

"THE PETITION.

"3. The petition of the plaintiff shall consist of an original petition and such supplemental petitions as may be necessary in the course of pleading by the parties to the suit, to enable the plaintiff to state all the facts presenting his cause of action, and such other facts as may be required to rebut the facts that may be set up in the original or supplemental answer, as pleaded by the defendant. The original petition and the supplemental petitions shall be indorsed, so as to show their respective positions in the process of pleading, as "original petition," "plaintiff's first supplemental petition," "plaintiff's second supplemental petition," and so on, to be successively numbered, named and indorsed.

"ORIGINAL PETITION.

"4. The plaintiff, in the original petition, in addition to the names and residences of the parties and the relief sought, may state all of his facts, amounting to a cause or causes of action, as has been the usual practice; or he may state the cause or causes of action in several different counts, each within itself presenting a combination of facts specifically amounting to a single cause of action, which, when so drawn, shall be numbered, so that an issue may be formed on each one by the answer.

"PLAINTIFF'S SUPPLEMENTAL PETITION.

"5. The plaintiff's supplemental petitions may contain exceptions, general denial and the allegations of new facts not before alleged by him, in reply to those which have been alleged by the defendant." (Rules 3, 4 and 5, 47 Texas, 616.)

These rules are recognized in the following authorities:

Grabenheimer vs. Blum, 63 Texas, 369-373.
Insurance Company vs. Camp, 64 Texas, 521-525.

An analysis of the above rules will show that every allegation necessary to support a judgment or decree in favor of the State must be made in the original petition. It will be seen that the original petition in this case complied with those rules. If the defendant company had plead only a general denial a judgment would have been obtained against it by proving the statements made in the petition. To avoid the case thus made it became necessary for the defendant company to specially plead payment.

Cartright vs. Jones, 13 Texas, 4.
Gray vs. McFarland, 29 Texas, 169.

This rule the defendant company recognized and pleading payments, it assumed the burden of proving them. Plaintiff's supplemental petition was a reply to this plea of payments. It could not be said to contain in any sense a statement of the plaintiff's claim or cause of action. Indeed, the claim or cause of action, as stated in the original petition was admitted on the trial, the admission being in the following language:

"It is admitted by the defendant that the State of Texas made to the Houston and Texas Central Railway Company, under the provisions of an act, entitled 'An act to provide for the investment of the special school fund in bonds of railroads incorporated by the State' approved August 13, 1856, a loan on the dates and in the amounts set forth in the *plaintiff's original petition* and that the said companies executed and delivered to the State of Texas on the dates and in the amounts set forth in the petition the bonds described in the petition in consideration of said loan." (Rec., p. .)

It was also admitted that on or before the 15th day of August, 1870, the Washington County Railroad Company became consolidated and merged with the Houston and Texas Central Railway Company and that said Houston and Texas Central Railway Company thereafter held possession of and claimed the property which had theretofore belonged to the Washington County Railroad Company. (Rec., p. .)

The bonds, the execution and delivery of which were charged

in said petition, expressly acknowledged the existence of the lien created by the legislature to secure the payments of the loans made thereunder. It is plain that the supplemental petition was in the strictest sense a reply to the defense pleaded and contained no part of the statement of plaintiff's claim or cause of action. There was, therefore, no error in denying the motion to remove.

It will be noted that the Court of Civil Appeals based its decision upon one question of fact and one question of law. It found as a fact that the warrants in which the payments were made were issued during the war and intended to be circulated as money. I understand that decision to be conclusive upon this court.

Egan vs. Hart, 165 U. S., 563.
Bacchus vs. Fourth Street Ry. Co., 159 U. S., 653.
Holloway vs. Dunham, 18 Sup. Ct. Rep., 784.
Harrison vs. Perea, 168 U. S., 311.

The State court also decided that the issuance of these warrants for the purpose of being circulated as money was prohibited by the section of the State Constitution which I have set out in the statement of the case. The State courts having determined that these warrants were void because issued in violation of the State Constitution, and that payments made in them were therefore void, the decision of the Federal question would be wholly immaterial because the question of payment was the only one in the case. This court has said that in a case in a State court where two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon a decision of the Federal question, and that if this does not affirmatively appear the writ of error will be dismissed.

Johnson vs. Risk, 137 U. S., 300.
Murray vs. Charlestown, 96 U. S., 432.
Jenkins vs. Lowenthal, 110 U. S., 222.

Hale vs. Akers, 132 U. S., 552.
Beaupre vs. Noyes, 138 U. S., 397-401.
New Orleans Waterworks vs. La. Sugar Refining Co., 125 U. S., 18.
Knight vs. Shelby Ry. Co., 125 U. S., 39.
Bacon & Graves vs. State of Texas, 163 U. S., 207.
Eustis vs. Bowles, 160 U. S., 361.
N. E. & N. Y. Ry. Co. vs. Wood Mfg. Co., 163 U. S., 689.
Hammond vs. Ins. Co., 160 U. S., 633.

This rule will be adhered to although this court may believe that the decision of the Federal question by the State court was erroneous.

Klinger vs. Missouri, 13 Wall., 257.

An examination of the decision of the Court of Civil Appeals will disclose that there was no Federal question decided. It was unnecessary to decide the Federal question and the decision was wholly based upon an intepretation of a provision of the State Constitution and the Texas statutes which indicated the purpose of the legislature in issuing these treasury notes.

The decision of the State courts in construing its own statutes and Constitution is not open for review in this court.

Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685.
Merchant's and Manufacturer's Bank vs. Penn, 167 U. S., 687.
Bacchus vs. Fourth Street Depot Co., 169 U. S., 566.
Chicago, Etc., Railway Co. vs. Minnesota, 134 U. S., 460.

It is respectfully submitted that the motion to dismiss the writ of error ought to be granted for the reason that this court is without jurisdiction.

M. M. Crane,
Attorney General.
Attorney for Defendant in Error.

We hereby waive issuance and service of notice of this mo-

tion and agree that this memorandum may be accepted as a complete substitute therefor.

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Attorneys for Plaintiffs in Error.

[NOTE:--The pages of the record above referred to have been left blank for the reason that copy of printed record has not been furnished me.]

HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 81. Argued December 13, 14, 15, 1899.—Decided March 26, 1900.

The Federal character of a suit must appear in the plaintiff's own statement of his claim, and where a defence has been interposed, the reply to which brings out matters of a Federal nature, those matters thus brought out by the plaintiff do not form a part of his cause of action.

The treasury warrants in question in this case cannot be said upon the evidence to have violated the Constitution of the United States, or of the State of Texas.

A warrant, drawn by the authorities of a State in payment of an appropriation made by the legislature, payable upon presentation if there be funds in the treasury, and issued to an individual in payment of a debt of the State to him, cannot be properly called a bill of credit, or a treasury warrant intended to circulate as money.

A deliberate intention on the part of a legislative body to violate the organic law of the State under which it exists, and to which the members have sworn obedience, is not to be lightly indulged; and it cannot prop-

Statement of the Case.

erly be held that the receipt of the warrants issued in pursuance of legislative authority in Texas, and in payment of an indebtedness due the State from the individual paying them, is an illegal transaction, and amounts in law to no payment whatever.

When a municipality contracts for a municipal improvement, which it is within its power to agree for, and engages to pay for the same in bonds which it is beyond its power to issue, and the work so contracted for is done, the municipality is responsible for it in money as it cannot pay in bonds.

Where the validity of a contract is attacked on the ground of its illegal purpose, that purpose must clearly appear, and it will not be inferred simply because the performance of the contract might result in an aid to an illegal transaction.

On the principles laid down in *Baldy* v. *Hunter*, 171 U. S. 388, the contract in this case cannot be held to be unlawful.

When the officers of the State, pursuant to its statutes, received warrants as payment, they acted for the State in carrying out an offer on its part which the State had legal capacity to make and to carry out; and the contract having been fully executed by the company and the State, neither party having chosen to refuse to perform its terms, neither party, as between themselves can thereafter act as if the contract had not been performed.

THIS proceeding was commenced by the State of Texas against the defendant, the Houston and Texas Central Railroad Company, (hereafter called the company,) to recover the amount due on certain bonds issued to the State, and to foreclose the lien which existed upon its property as security for the payment of such bonds. The company is the legal successor of the two companies which received the loans and gave their bonds, and no question of liability arises on that ground. Judgment was given in the trial court for the amount found due, and a lien was declared and a sale of the property of the company ordered. From this judgment the company appealed to the Court of Civil Appeals for the State, where it was modified, and then affirmed. The company brings the case here on writ of error.

The petition of the State by which the proceeding was commenced showed that the predecessors of the plaintiff in error borrowed money from the school fund of the State and gave their bonds therefor. These bonds were not paid according to their tenor and effect, and the legislature therefore, on August 13, 1870, passed a general act for the relief of railroad

companies indebted to the State, by which it was provided that if any company should on the first day of November, 1870, pay six months' interest on the aggregate amount of the loan, which, on the first day of May, 1870, was due from it to the State, and one per centum of the principal, and thereafter should make similar semi-annual payments, the State would not exact any other payments.

(What was the aggregate amount of the loans due on the first of May, 1870, from the two companies of which the present company is the successor, is the question in controversy, and its answer depends upon the validity of certain payments made by the companies to the State in treasury warrants during the war. Part of the discussion rests upon the meaning and effect of this act, and it is, therefore, given in full in the margin.)[1]

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[1] An act for the relief of railroad companies indebted to the State for loans from the Special School Fund.

Whereas, the political disturbances since the year 1860, by unsettling the business of the country, have largely contributed to prevent compliance on the part of railroad companies indebted to the State for loans from the special school fund, with their engagements respecting the payment of the principal and interest of said loans; and,

Whereas, it is desired to relieve said companies from the liability of their railroads to sale consequent upon their non-compliance as aforesaid: Therefore,

SEC. 1. Be it enacted by the Legislature of the State of Texas, That any railroad company indebted to the State for loans from the special school fund may avoid the sale of its railroad for the non-payment of principal or interest by the payment into the treasury of the State, on the first day of November, A. D. 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870, and by the payment, in addition, on said first day of November of one per cent. upon said aggregate amount, to be applied toward the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest, and one per cent. on account of said sinking fund semi-annually thereafter, to wit, on the first day of May and November in each year.

SEC. 2. That if any railroad company shall fail to pay any amount required to be paid in section one of this act at the time designated thereby, or within ten days thereafter, then the whole debt of such company, principal and interest, shall become due, and the governor shall proceed without delay to cause the railroad of said company and its franchises and property, so

Subsequently, semi-annual payments of interest and sinking fund were made by or on account of the Washington County Railroad Company, (one of the predecessors of the plaintiff in error,) up to and including the first of May, 1879, but no payment was made on November 1, 1879, or at any time thereafter. Similar payments were made by or on account of the Houston and Texas Central Railway Company (the other of such predecessors) up to and including the first day of May, 1893, but a portion only of the semi-annual interest claimed to be due in November, 1893, was paid, and nothing has been paid since November, 1, 1893. Judgment was prayed for the sums of money stated to be due with interest, for the foreclosure of the lien and for a sale of the property under execution, the proceeds to be applied to the payment of the sum due with interest, and for such other relief as might be necessary.

To this petition the defendant filed an answer, and therein among other things alleged that after the commencement of the civil war the various railroad companies were unable to fulfil their obligations to the State, and therefore the legislature of Texas, on the eleventh day of January, 1862, passed an act for their relief, extending the time of payment of interest and sinking fund amounts until the first of January, 1864.

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far as the lien or mortgage of the State covers the same, to be sold, the sale to be in all respects (when not in conflict with this act) conducted according to the provisions of the statute of August 13, A. D. 1856: *Provided, however*, That in case the governor should (for the protection of the school fund) deem it necessary, he may buy in any road to be sold under this act, in the name of the State: *Provided, further*, That if the whole principal and interest which may become due as aforesaid, and all costs attending the advertisements and proposed sale, shall be paid before the day of sale, then the proceedings for sale shall be stopped.

SEC. 3. That the State of Texas will not exact of any railroad company not hereafter in default in respect to any of the payments required in this act the payment of the principal of the debt of said company, excepting said payments on account of the sinking fund as aforesaid, but that any company may pay the same in full at any time on thirty days' notice to the governor, and that said lien or mortgage of the State shall not attach to any extension of its existing road hereafter constructed by any of said companies.

SEC. 4. That this act shall take effect from and after its passage.

Approved, August 13, 1870, p. 85, c. 63.

Statement of the Case.

The state legislature, on December 16, 1863, passed the first act in relation to receiving treasury warrants from railroad companies, c. 57, which reads as follows:

"SEC. 1. Be it enacted by the Legislature of the State of Texas, That the comptroller of the State be, and he is hereby, authorized to receive from the railroad companies in this State who are indebted to the special school fund, all interest on their bonds that may now be or hereafter become due, provided the same is tendered in state bonds or in state treasury warrants, previous to the meeting of the next regular session of the state legislature.

"SEC. 2. That for all sums so paid in, the comptroller and treasurer shall issue to the special school fund the bonds of the State bearing 6 per cent. interest."

The legislature also passed another act on May 28, 1864, c. 16, which reads as follows:

"SEC. 1. Be it enacted by the Legislature of the State of Texas, That the provisions of the act of which it is amendatory shall not apply to railroad companies that fail or refuse to receive state bonds or state treasury warrants at par for freight or passage at the prices or rates established by law.

"SEC. 2. That whenever satisfactory evidence is produced or furnished to the comptroller of the State that any railroad company has failed or refused to receive the state bonds or state treasury warrants at par for freight or passage at the rates established by law, he is required to refuse to receive the state bonds or treasury warrants for the interest due by said railroad upon its bond.

"SEC. 3. That the president of any railroad in this State be, and is hereby, required to post in a conspicuous place in the railroad offices and in the passenger cars the provisions and terms of this act, under a penalty of $100, to be recovered for the benefit of the State by suit before any court of competent jurisdiction, upon information of any party."

On November 15, 1864, still another act was passed by the legislature, c. 16, which reads as follows:

"Be it enacted by the Legislature of the State of Texas, That the railroad companies of this State that are indebted

to the special school fund shall continue to be allowed the privilege of paying the interest due said fund in the treasury warrants and bonds and coupons of the State; and may also discharge the whole or any part of the principal of their indebtedness to that fund (in the same manner) provided such railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par with specie for freight and passenger travel.

"That all treasury warrants and bonds and coupons of the State, so received into the state treasury, shall be cancelled; and the comptroller shall issue the bonds of the State, bearing six per cent. interest to the special school fund for the amount so paid in; and this act take effect from its passage."

Upon the passage of these various acts and in reliance upon the agreement and obligation of the State, as evidenced thereby, the two companies acquired treasury warrants upon good consideration, and after the passage of the act of May, 1864, they received treasury warrants at par in payment of freight and passenger services rendered by them to the various people who demanded the same, and they subsequently paid treasury warrants to the comptroller of the State in payment of interest due on their indebtedness, (the amounts of such payments are set forth in the answer,) and upon such payment and receipt of the warrants by the comptroller and treasurer they were cancelled as authorized and required by the above mentioned act, and thereupon the comptroller and treasurer issued the bonds of the State bearing six per centum interest to the special school fund for the amount so paid by the railroad companies in treasury warrants. By reason of all which it was alleged that a valid and binding contract between the State and the railroad companies was made, that the payments in treasury warrants should be valid payments, at their par value, upon the various loans made by the State to the companies; and it was further alleged that the payments by treasury warrants had been received by the authorities of the State and cancelled, and a credit for the amount thereof as payment given to the companies on the books of the State, and that the transaction thereby became fully executed, and

the State could not thereafter dispute or question the validity of such payments or the right of the company to the credits given it by the State.

It was also alleged that after the passage of the act of August 13, 1870, and about the first of November, 1870, the comptroller of the State, with the concurrence and approval of the governor, wrongfully and without authority of law, recharged each of the railroad companies respectively upon the books of the comptroller's office with the several amounts theretofore paid by them respectively in treasury warrants, and there was demanded from the respective companies on the first day of November, 1870, six months' interest and one per centum for the sinking fund on the aggregate amount of the loan, as made up by the comptroller, after striking out the payments made by the company with the treasury warrants. These amounts were paid under protest, as being illegally demanded and resulting in a violation of the contract existing between the companies and the State. Payments on the same basis were continued semi-annually from that time, accompanied by a protest similar to the one first mentioned, until, as the company contends, the full amount due by it to the State had been paid, provided the payments in treasury warrants were credited as valid payments. Since that time the company has refused to make further payments. It claimed that the act of August 13, 1870, as construed by the state authorities, impaired the obligation of the contract existing between the State and itself, and thereupon it prayed for judgment.

To this pleading the plaintiff filed its first supplemental petition, and therein specially set up that the three several acts of the legislature of the State, mentioned in the defendant's answer as the authority for the payment upon the bonds of the company in treasury warrants, were unconstitutional and void, because (1) the warrants in which payments were authorized to be made were issued for the purpose of being circulated as money and were in violation of the state constitution; (2) also because they were bills of credit emitted by the State, and therefore in violation of section 10 of article 1 of the Constitution of the United States; and (3) because the acts under which the

warrants were authorized to be paid, together with other acts passed at or about the same time, plainly indicated that the treasury warrants and other obligations in which payments were authorized to be made, and which were made by the defendant, were issued in aid of the rebellion against the United States of America, and were, therefore, void.

Upon these pleadings a motion was made by the company to remove the case to the United States Circuit Court, on the ground that by the filing of the plaintiff's last above mentioned pleading it became apparent for the first time, from plaintiff's statement of its own claim, that the case was one arising under the Constitution or laws of the United States, and defendant was therefore entitled to a removal. The motion was denied, and although further pleadings were thereafter served on each side, they are not material to the matters discussed in the opinion.

The case was tried without a jury, there being no dispute as to the facts. The trial court held that the payments in treasury warrants were illegal because they were issued to circulate as money, in violation of the constitution of the State. It also held that they were issued, or at least some of them were issued, in direct aid of the rebellion and were therefore void; that the burden rested with the defendant to show, if it could, which, if any, of the warrants were valid. Judgment was given in favor of the State.

The company then appealed to the Court of Civil Appeals for the Third Supreme Judicial District of the State, where the judgment was modified so as to render no personal judgment against the company, and to foreclose the lien of the State only upon that part of the road which the findings showed was in existence on August 13, 1870, and as thus modified it was affirmed, solely on the ground that the warrants were issued in violation of the state constitution, as paper intended to circulate as money. A writ of error was applied for to the Supreme Court of Texas, and by that court refused. The company then brought the case here by writ of error to the Court of Civil Appeals. The defendant in error has made a motion to dismiss the writ on the ground that this court has no jurisdiction, for reasons stated in the opinion.

Mr. John G. Carlisle and *Mr. R. S. Lovett* for plaintiffs in error. *Mr. J. P. Blair* and *Mr. Maxwell Evarts* were on their brief.

Mr. Charles A. Culberson for defendants in error. *Mr. T. S. Smith* and *Mr. M. M. Crane* were on the briefs.

Mr. Justice Peckham, after stating the foregoing facts, delivered the opinion of the court.

The motion to dismiss the writ of error must be denied. The case involves a Federal question under the contract clause of the Constitution.

The claim on the part of the defendant in error, the plaintiff below, is that the state court decided the case under the provisions of the state constitution only, and without reference to the act of 1870, which the plaintiff in error (the railroad company) alleges to be an impairment of the contract set up by it in the pleadings. Although the state court held that the payments in dispute were made by means of state treasury warrants issued to circulate as money, which were therefore void as in violation of the constitution of the State, and that the delivery of the warrants by the company amounted to no payment whatever, the question still remains whether by that decision any effect was given to the act of 1870. We think the judgment of the state court did give effect to that act.

It will be seen that the third section provides that the State will not exact of any railroad company, not thereafter in default, the payment of the principal of the debt, excepting as paid by the payments due the sinking fund under the provisions of the act; it also provides in the second section that if a railroad company failed to pay the amount required to be paid in section one, at the times designated thereby or within ten days thereafter, then the whole debt of such company, principal and interest, should become due, and the governor was directed to proceed as therein stated.

The first thing to be done in order to be able to carry out the provisions of the act was to ascertain what the aggregate amount

of the loan was, as that amount stood on the first day of May, 1870, because it was upon that amount that interest semi-annually was to be paid, and also one per centum of principal to the sinking fund. The authorities of the State determined what the aggregate amount was as it stood on the first day of May, 1870, and they arrived at that amount by refusing to recognize as valid any payment which the company had made in treasury warrants, and in that way they made the aggregate amount larger by those sums than that made by the company, which claimed to be credited with the amount of its payments in those warrants. Upon the aggregate amount, as determined by the authorities of the State, payment of the interest and for the sinking fund was demanded under the act. This demand was complied with by the company under protest, and accompanied by a claim on its part that the aggregate amount due on the loan was less than that stated by the authorities of the State by just the amount of the payments which the company had made in these treasury warrants. The protest was overruled and the claim denied, and thereafter the same protest and the same claim were made and the same action taken upon the part of the state authorities on each semi-annual occasion when payments were due and made. This lasted until the payments made by the company in cash and in the treasury warrants, upon the basis of the legality of the payments in such warrants, paid the indebtedness due from the company to the State, and from that time it has refused to make further payments. The State did not acknowledge that full payment had been made of that indebtedness, and thereupon commenced the present proceeding to recover the amount it claimed to be due and to foreclose its lien against the company. This it could not do under the statute of 1870 unless the company had defaulted in respect to the payments required under that act.

It is admitted that the company had not so defaulted, provided the payments in treasury warrants were duly credited to it, nor is it denied on the other hand that if those payments were not valid payments and ought not to be credited to the company, then it had defaulted in respect to the payments required by the act before the commencement of these proceed-

ings. When the state court, therefore, decided that these warrants were issued in violation of the constitution of the State, and that payments in them were in fact and in law no payments, and gave judgment accordingly, the effect of that decision was necessarily to hold that the company had defaulted in respect to the payments required under the act, and that the proceedings of the State to collect the sum due were permitted by the act, and effect was thus given to such act, although not one word was spoken in regard to it in the opinion delivered in the state court.

If the railroad company had not failed to pay any amount required to be paid in section one of the act, then the proceeding herein could not have been taken, by reason of the provision contained in the third section, and it is only after a failure to pay for ten days that the second section permits the proceedings to be taken to collect the amount. In giving judgment for the plaintiff, therefore, the court has in effect determined that the plaintiff was proceeding rightly under the act of 1870, and effect was thus given to its provisions.

The judgment of the Court of Civil Appeals gives an additional effect to the act, because by its judgment there is struck out the provision in the judgment of the trial court in regard to the lien of the State, and it has limited that lien in accordance with the third section of the act, so that it should not attach to any extension of the railroad which had been constructed since its passage. Although that modification may be a favor to the company, it nevertheless gives effect to the act. The company has not accepted that act so that it cannot draw in question its validity as construed by the state court, and hence no reason is shown for the granting of the motion to dismiss on that ground. The only acceptance consists in the payments made by the company to the State after its passage. The very first payment made by the company, under the act, namely, on the first day of November, 1870, was however made while asserting the claim that payments in treasury warrants were valid and should be acknowledged and credited to the company, and upon the refusal of the state authorities to admit those payments the company paid the interest and percentage on the larger sum de-

manded by the State, under protest, that such demand was illegal and improper, and every subsequent payment was made under the same protest by the company. Payments so made show no such acceptance of the act as to prevent the company from thereafter drawing in question its validity as construed by the state authorities.

Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the state constitution, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but on the contrary has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below. *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116; *University* v. *People*, 99 U. S. 309; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131; *New Orleans Water Works Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18; *Central Land Company* v. *Laidley*, 159 U. S. 103, 109; *Bacon* v. *Texas*, 163 U. S. 207, 216; *McCullough* v. *Virginia*, 172 U. S. 102.

In this case we think we have shown that the judgment did give effect to subsequent legislation which, as construed by the state court, the company claims has impaired the obligation of the contract between itself and the State. The writ of error was therefore well brought.

The motion for the removal of this case to the United States Circuit Court was properly denied. The statement of the cause of action as contained in plaintiff's first petition did not show that the suit was one arising under the Constitution, laws or treaties of the United States.

The suit, as it appears upon the face of the petition of plaintiff, was upon the bonds given by the company for the loan of a portion of the school fund, and to foreclose the lien of the State upon the property of the company, and in the petition reference was made to the act of 1870 for the purpose of stating the amount due on the bonds for principal and interest. Nothing upon the face of this petition showed any fact upon which Federal jurisdiction could be based. The company answered by alleging certain payments in treasury warrants, which, if properly credited, would show that with the other payments that had been made there was nothing due the plaintiff on the bonds. As an answer to this defence the plaintiff set up the invalidity of the laws providing for payments in treasury warrants; that the warrants were issued by the State in violation of both the state and Federal Constitutions, and that the payments were therefore illegal and void. This was no part of the plaintiff's cause of action upon which suit was brought, and that cause of action did not in any way involve a question arising under the Constitution or laws of the United States. The defendant, therefore, made out no case for a removal to the United States Circuit Court. *Oregon &c. Railway Company* v. *Skottowe*, 162 U. S. 490, 494; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Galveston, Harrisburg &c. Railway* v. *Texas*, 170 U. S. 226, 235.

The result of the authorities is that the Federal character of the suit must appear in the plaintiff's own statement of his claim, and that where a defence has been interposed, the reply to which brings out matters of a Federal nature, those matters thus brought out by the plaintiff do not form a part of his cause of action, but are merely a reply to the defence set up by the defendant. The review of the Federal question by this court is not thereby precluded, for it having been properly raised in the state court and decided against the contention of the party setting it up, this court may review it on error to the highest court of the State.

This brings us to the question what, if any, contract existed between the State and the company consequent upon the payments by the company to the comptroller of the State in the treasury warrants heretofore mentioned.

Opinion of the Court.

The company contends that by the passage of the acts of December 16, 1863, May 28, 1864, and November 16, 1864, and by its compliance with such acts and its payment of treasury warrants to the comptroller and their receipt by him and his cancellation thereof, there was an executed transaction, and an implied contract thereupon arose that such payments should remain and be regarded as valid and effectual, and that this implied contract was entitled to the protection of the Constitution of the United States, and its obligation could not be impaired by any subsequent act of the legislature of the State.

These acts have been already set forth. The company alleges that it fully complied with all of them, and that relying upon the offers thus made it paid to the State the warrants mentioned, which were received by the comptroller and cancelled, and bonds of the State for a like amount, bearing six per cent interest, were issued by him to the school fund.

The provision in the state constitution, which it is alleged was violated by the issuing of these warrants, is contained in the eighth section of article seven of the constitution of 1845, in which, among other things, it was provided, " . . . and in no case shall the legislature have the power to issue treasury warrants, treasury notes or paper of any description intended to circulate as money." The same provision is found in the constitution of Texas adopted in 1861.

It is contended on the part of the State that these warrants were issued in violation of that section of the constitution, inasmuch as they were treasury warrants intended to circulate as money.

It is stated in the opinion, delivered in the Court of Civil Appeals, "that the warrants of the State, issued during the period of the war after January 1, 1862, were intended to be used and circulated as money, and in this connection it is well to say that we are of the opinion, from all that it is shown by the record, together with various acts of the legislatures during that time, that the payments made in warrants by the railway companies upon the obligations sued upon were in warrants issued after the time we have declared they were intended to circulate as money."

The question whether the legislature so intended is one to be decided by an inspection of the act under which they were issued, and possibly by reference to the text of other acts of the legislature enacted at or about the same time. Whether an act provides for the issuing of warrants that were intended to circulate as money is in reality a question of law arising upon the construction of the legislative act, and a finding by the court that warrants issued under and by virtue of certain acts of the legislature were issued with such intention is in the nature of a legal conclusion and not a finding of fact, and therefore it can be reviewed by this court.

To prove that these warrants were so issued, reference is made to various acts of the legislature, (in addition to those above mentioned under which the payments were made by the company,) among which are the following:

The act approved February 14, 1860, which provided that when an account was presented for payment for which an appropriation had been made it was the duty of the comptroller to audit it if legal and to issue his warrant for the amount, and if there were any money in the treasury to pay the demand the comptroller was directed to issue his warrant upon the treasurer for the amount with ten per centum per annum interest, and those warrants were to be signed by the governor and indorsed by the treasurer. The act further provided that these warrants should not circulate as money, but might be assigned.

It is said that the warrants issued under this act were few, and they are not classed among the warrants in which any payments were made to the school fund. It is, of course, not contended that these warrants were intended to circulate as money, but the act was repealed in 1862, and the repealing act, while containing other provisions, omitted the provision that the warrants to be issued should not circulate as money, and that omission is regarded by counsel as suggestive of the intention of the legislature that the warrants issued under the act of 1862 should so circulate.

By the second section of that act it was provided that the comptroller on presentation of any warrant bearing interest, as well as on presentation of any other legal claim for which an

appropriation had been made, should draw a warrant on the treasury for the amount, and payment was to be made if there were any money in the treasury; but, if not, the comptroller was authorized to issue one or more warrants for the amount that might be due and payable to the party entitled to payment, or bearer, "and said warrants shall be of such proportions of the claim as may be expressly required by the holder; provided, that not more than one tenth of the whole amount may be issued in warrants of one dollar each and the balance of five dollars or more each, and said warrants shall be indorsed by the treasurer, and every interest-bearing warrant that is superseded shall be cancelled by the comptroller."

The third section of the act provided that when the warrants were presented at the treasury and paid they should be cancelled, and should not be reissued.

By the act of January 11, 1862, it was provided that treasury warrants, not bearing interest, in addition to the other provisions made for their reception in payment for lands, (including certificates therefor,) should be receivable as money in the payment of office fees, including fees for patents and land dues payable in the general land office, taxes and all other dues to be collected for the State or in its name, with exceptions therein stated.

By another act passed on the same day, January 11, 1862, (General Laws, Texas, 1862, page 38,) the treasurer and every other officer of the State and of counties who had received as public money, among other things, the treasury warrants of the State, were directed to disburse or transfer the same as money, at par, if the person or persons entitled to have a disbursement or transfer would receive such warrants as money, and officers who were authorized to receive public money were authorized and directed to receive these warrants as money, except when expressly prohibited by some other law. Treasury warrants of the State received by the treasurer thereof were not to be reissued.

Also on December 16, 1863, another act was passed, c. 60, section 2 of which reads as follows:

"A tax of one half of one per cent. shall be levied and col-

lected in kind on all specie, treasury notes of the Confederate States of America, treasury warrants of the State of Texas, and bank notes, held or owned within this State, and all foreign bills of exchange and certificates of deposit, and other evidences of money upon deposit or secured beyond the limits of the State, owned by persons residing therein, shall be known as specie, and thereon shall be levied and collected a tax of one half of one per cent. in specie."

The court below has construed these various acts, in connection "with well-known matters of history relating thereto," and considering also the character of legislation during the period of the war, as establishing the intention of the legislature that the warrants should circulate as money. It is stated in the opinion that the legislation, providing the purpose for which they could be used and the small amounts for which they could be issued, and also the size, shape and color of the warrants, together with the history of the times and the well-known depleted condition of the treasury during that period, and the scarcity of existing, reliable and available circulating medium, as money, all showed that the purpose of the various acts of the legislature was to give to the warrants issued during that time as much as possible a standing and character as money. The court therefore held that the warrants were void, as issued in violation of the constitution of the State; the payment made in them was in law no payment; that no contract arose between the State and the company by reason of the use made of the warrants in surrendering them to the comptroller, and that, therefore, no defence to plaintiff's cause of action was established.

These warrants were issued pursuant to appropriations made by the legislature and in payment of debts existing at the time in favor of the individuals to whom they were delivered. They were payable at once, and if there had been funds of the State in the treasury they would have been immediately paid and cancelled. It was only because there was no money in the treasury that they were not paid. The State therefore provided that they might be received in payment of taxes or dues to the State, and that its officers might disburse them in pay-

ment of its debts to any person who would consent to receive them, but that when presented to the treasurer of the State and received by him they should be cancelled.

We have been referred to no act making provision for the size, shape or color of the paper to be used for the warrants, and such size, etc., cannot be regarded as evidence of any weight as to the intent on the part of the legislature that they should circulate as money, nor does the depleted condition of the treasury or the scarcity of a circulating medium necessarily or properly induce to that conclusion. That the size of the warrant, both as to amount and shape, might somewhat facilitate a holder, upon occasion, to discharge a debt, and in that way use it as money, is not at all sufficient or indeed any proper evidence of an unlawful intent on the part of the legislature. The act of December 16, 1863, is not the slightest evidence on the subject. It simply provided for taxing specie, treasury notes of the Confederate States, treasury warrants of the State, and bank notes held or owned in the State. It also provided a tax upon foreign bills of exchange and other evidences of money on deposit or secured beyond the limits of the State and owned by persons residing therein, and provided that they should be known as specie. The fact that treasury warrants were mixed up in such an act for the purpose of taxation with specie, bills of exchange, certificates of deposit, etc., has not the slightest tendency to prove the intent that the warrants should circulate as money.

It does not seem to us that this legislation shows that the warrants were thus issued within the meaning either of the state or the Federal Constitution. The only provision looking towards a treatment of the warrants in any manner as money is the direction to the State's own officers to receive them as payment for taxes and dues to the State, and to pay them as money to such persons as would receive them in payment of the indebtedness of the State to them.

The fact that a creditor of the State, willing to receive payment in these warrants, might demand that they should be issued to him in small sums, and not in one single warrant, does not bear with great force upon the intent of the legislature that the warrants should thereafter circulate as money. It does not

show that those warrants were intended to so circulate between individuals for the ordinary purposes of society and in the general transactions of business between citizens. For the State to say that the warrants should be transferred or disbursed by its own officers, as money, if the person entitled to a transfer or disbursement from the State would receive them as money, simply amounts to a declaration that the warrants should be issued to all such persons as would accept them in payment of the debts due them from the State. To encourage such willingness the provision was made that these warrants should be receivable as money, that is, as payment for certain debts due the State, as for taxes, etc. This use of the words "as money" has, in our judgment, no further significance, and has no force for the purpose of showing the intention of the legislature to have the warrants circulate generally as money and to form a circulating medium of that kind of paper.

It must not only be that they are capable of sometimes being used instead of money, but they must have a fitness for general circulation in the community as a representative and substitute for money in the common transactions of business. This is what is meant by the expression "intended to circulate as money." These warrants were payable to the individual to whom the State was indebted, or to bearer, and were issued to a creditor of the State. That the legislature may have desired to facilitate the use of the warrants by these provisions is perhaps true. But the members of the legislature knew that to issue the warrants to circulate as money would be to condemn them from the start. That the promise should be made to receive them in payment of debts due the State would add to their usefulness and to the willingness of people to take them in payment of debts due them from the State, and that while in their hands others might receive them in payment of debts was a possibility or probability depending upon whether the person taking them had opportunity to use them to pay some of his own debts to the State. That he might on some occasion be able to so use the warrant as to enable him to thereby discharge an obligation from himself to a third person who was willing to accept it does not bring the warrant so used within

the ordinary meaning of the term money. It is not money in that sense.

The provision in the state is substantially the same as that in the Federal Constitution, in that the legislature is prohibited from issuing treasury warrants, treasury notes or paper of any description intended to circulate as money, while in the Federal Constitution the prohibition is against a State's emitting bills of credit, and the necessity exists in both that the paper shall be issued to circulate as money, in order to be in violation of either instrument. It has been held that the bills of credit prohibited by the Federal Constitution are those which were intended to circulate as money, and hence the authorities as to the meaning of that expression, when so used, are applicable here.

In *Craig* v. *State of Missouri*, 4 Pet. 410, Chief Justice Marshall, in referring to the meaning of the clause in the Constitution prohibiting a State from emitting bills of credit, said (page 432):

"The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit,' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood."

It is true the court in the *Craig* case held that the certificates authorized by the State of Missouri were void, because they were in effect bills of credit. They were issued on account of loans made from time to time to the State, and were held to have been issued to circulate as money. The court then consisted of seven members, and Mr. Justice Johnson, Mr. Justice Thompson and Mr. Justice McLean did not concur in the judgment. Mr. Justice Johnson thought that the term did not extend to certificates that bore interest and the value of which varied with each passing day; that they approximated to bills

drawn upon a fund, not to be withdrawn by any law of the State; that the promise was also to receive in payment of debts and taxes due the State, and the certificates did not depend for value upon the faith of the State only, and hence they were not bills of credit.

Mr. Justice Thompson thought they were not bills of credit for the reason, among others, that the act did not profess to make them a circulating medium or a substitute for money; it made them only receivable for taxes, etc., due the State, and those were special and limited objects not sufficient to enable the certificates to answer the purpose of a circulating medium to any considerable extent.

Mr. Justice McLean thought that to constitute a bill of credit it must be issued by a State, and its circulation as money enforced by statutory provisions. At page 454 he said: "Where a warrant is issued for the amount due to a claimant, which is to be paid on presentation to the treasurer, can it be denominated a bill of credit?" He thought not.

In the subsequent case of *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, the same question as to the meaning of the term bills of credit arose, and Mr. Justice McLean delivered the opinion of the court.

The question was whether bank notes issued by the Bank of the Commonwealth of Kentucky, declared by the state act of incorporation to be exclusively the property of the Commonwealth, were bills of credit. In the course of the opinion the judge stated, page 312: "The terms bills of credit in their mercantile sense comprehend a great variety of evidences of debt, which circulate in a commercial country. . . . But the inhibition of the Constitution applies to bills of credit in a more limited sense. It would be difficult to classify the bills of credit which were issued in the early history of this country. *They were all designed to circulate as money*, being issued under the laws of the respective colonies."

Reference is made in the course of the opinion to *Craig* v. *Missouri* (*supra*), and to the views of the two dissenting judges (besides himself) as to the meaning of the expression, and he ends the discussion of that part of the question by referring to

what Chief Justice Marshall had said, and adding: "The definition, then, which does include all classes of bills of credit emitted by the colonies or States, is a paper issued by the sovereign power containing a pledge of its faith and designed to circulate as money."

It was held that the bank notes in question did not fill that definition. In *Woodruff* v. *Trapnall*, 10 How. 190, 205, the question was again referred to by Mr. Justice McLean in delivering the opinion of the court, and he said that the notes of the banks therein mentioned were not bills of credit, upon the authority of the *Briscoe* case. To the same effect is *Darrington* v. *Bank of Alabama*, 13 How. 12, the opinion being also delivered by Mr. Justice McLean. The State creating the bank in that case was the only stockholder, and its credit was pledged for the ultimate redemption of the notes of the bank.

The court said it was impossible to hold that bills issued by the bank came within the definition of bills of credit. *Briscoe* v. *The Bank* (*supra*) was again referred to and the definition approved, that the paper must be issued by a State, upon its faith, designed to circulate as money, and to be received and used as such in the ordinary business of life.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 283, the coupons in question were in the ordinary form, and one of them was set out in the opinion of the court, and is as follows:

"Receivable at and after maturity for all taxes, debts and demands due the State.

"The Commonwealth of Virginia will pay the bearer thirty dollars interest, due 1st January, 1884, on bond No. 2731.

"Coupon No. 20. GEO. RYE, *Treasurer*."

It was contended that this coupon was a bill of credit in the sense of the Constitution, because receivable in payment of debts due the State, and negotiable by delivery merely and intended to pass from hand to hand and to circulate as money.

It was in consequence of unrestrained issues of paper money by the colonial and state governments, based alone upon credit, said the court, that this clause in the Constitution prohibiting the emission of bills of credit by the States was adopted, and

the proper definition of the term was not founded on the abstract meaning of the words so as to include everything in the nature of an obligation to pay money, reposing on the public faith and subject to future redemption, but was limited to those particular forms or evidences of debt that had been so abused to the detriment of both private and public interests.

Speaking of these particular coupons the court said:

"They are issued by the State, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the State, but they were not emitted by the State in the sense in which a government emits its treasury notes, or a bank its bank notes—a circulating medium or paper currency—as a substitute for money. And there is nothing on the face of the instruments, nor in their form or nature, nor in the terms of the law, which authorizes their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate, in the common transactions of business, as money, nor that in fact they were so used."

The fact that the coupons were receivable in payment of taxes, and other dues to the State, and hence might circulate from hand to hand as money, was held to fall far short of showing their fitness for general circulation in the community as the representative and substitute for money in the common transactions of business, which the court held was necessary to bring them within the constitutional prohibition against bills of credit. This reasoning applies with equal force to treasury warrants. Both classes of paper must be intended to circulate as money, and the same conditions regarding such intention and the same evidence to prove it would be necessary in each case.

In the light of these authorities, it seems to us that it cannot be properly said that the treasury warrants violated the Constitution, either of the State or of the United States, because there is no evidence that they were intended to circulate as money within the meaning of that term as already given. The record does not show that the legislature intended that these warrants should or that they could be so used as to circulate

among the people as money, to be used by them as a paper currency or a circulating medium in their dealings with each other. Small denominations of the warrants would certainly facilitate their retirement through their use for payment of taxes and other debts due the State, and would increase their convenience for paying freight or passenger fare to the companies, which would then have an opportunity to present them to the State, in payment of interest, and as the laws did not provide for their circulation as money, but only to be received or paid by the officers of the State between the State and its debtors and creditors and to the railroad companies, as stated, it cannot be supposed from such evidence that it was the intention of the legislature that these warrants should be circulated as money, and should thus violate the provisions of the Constitution.

A warrant drawn by the state authorities in payment of an appropriation made by the legislature, where the warrant is payable upon presentation, if there be funds in the treasury, and which has been issued to an individual in payment of the debt of the State to him, cannot, as it seems to us, be properly called a bill of credit or a treasury warrant intended to circulate as money. Although the State directed its officers to receive the warrants as money, in payment of certain dues to the State, and to deliver them to those who would receive them as money in payment of dues from the State to such persons, yet, as we have already remarked, this direction was only another mode of expressing the idea that, as between the State and the individual, the delivery of the warrant should operate as a payment of the debt for which the delivery was made. When the warrants once came back to the treasurer of the State, they were not to be reissued. The decisions of this court have shown great reluctance, under this provision as to bills of credit, to interfere with or reduce the very important and necessary power of the States to pay their debts by delivering to their creditors their written promises to pay them on demand, and in the meantime to receive the paper as payment of debts due the State for taxes and other like matters.

If any fair doubt could arise, it should be solved in favor of the validity of the paper. There must be an intention on the

part of the legislature that the paper should circulate as money. There must, in other words, be an intention to violate the constitution.

A deliberate intention on the part of a legislative body to violate the organic law of the State under which it exists and to which the members have sworn obedience, is not to be lightly indulged. The existence of such intention should be proved beyond doubt or cavil from the very acts themselves which are under discussion, and if it be reasonably possible to so construe them as to render them valid, a proper respect for the legislative department calls for such construction rather than one which invalidates them, because they were enacted with a direct purpose to violate the state constitution.

But if for the purpose of this argument it should be assumed that the warrants, although issued to those who were the creditors of the State and in payment of the debts due from the State to those creditors, were nevertheless issued to circulate as money, and therefore in violation of the constitution, it cannot be properly held, in our opinion, that the receipt of such warrants pursuant to legislative authority and in payment of an indebtedness due the State from the individual paying them is an illegal transaction and amounts in law to no payment whatever.

The State was debtor to the individuals to whom the warrants were first issued in payment of that indebtedness, and all that can be said is that it violated the law by giving this particular form to the instrument by which it assumed to pay its debt. Surely if for that reason the delivery of the warrants constituted no payment, the State would have the right to make such payment in some other way. If, by reason of the violation of the constitution, its direction to the treasurer to pay the warrant was void, and no action could be maintained upon the warrant, by reason of its invalidity, (aside from the fact that the State would not be suable,) there is certainly nothing to prevent the State from recognizing the debt it actually owed, and which it assumed to pay by issuing these warrants. That recognition may be contained in the very law which authorizes their issue or in some other law. When, therefore, it passed the statutes providing that the warrants should

be received in payment of taxes and other dues to it, and also by the comptroller in payment of the interest and sinking fund due from the railroad companies to the State, and when by virtue of such authority the state officers actually did receive the warrants for such payments, we see no illegality in the payments, and it seems to us that credit therefor should be given accordingly.

Suppose that the State, intending to issue these warrants to circulate as money, had paid them through its officers to its creditors, and had then become convinced that the warrants were a violation of the constitution of the State and ought not to have been issued. Could not the State say to the creditors to whom these warrants had been paid, if you will give them back we will pay you in a form that is not a violation of the constitution? Would anybody suspect that surrendering these warrants to the State and receiving other warrants in their stead, in a form which did not violate the constitution, would be an illegal act on the part of the State? The original warrants having been issued to various creditors of the State, and they very likely having transferred them to others, wherein would consist the illegality if the State offered to and did receive those warrants from such others and paid their amount in valid obligations? Instead of paying their amounts in valid obligations, where is the invalidity if the State offers to receive them and to cancel obligations which the party owes to it to an amount equal to their face value? All this is but another way of paying the indebtedness which the State originally owed to the individuals to whom it issued these warrants, and when it cancels obligations due to it of an amount which equals the face value of the warrants, and receives the warrants in return, the legal effect is the same as if the warrants had never been transferred by the persons to whom they were originally issued, and they had brought them back to the State, and the State had given in exchange for them some valid evidence of indebtedness.

It seems to us that the same principle is involved as was enforced in *Hitchcock* v. *Galveston*, 96 U. S. 341, 350, where a city had contracted with the plaintiffs for the improvement of its sidewalks, and agreed to pay for the same in bonds which it

was beyond the power of the city to issue. It was held that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the performance of the contract. The court said: "If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payments need not be made at all."

Suppose in that case the bonds had been issued by the city in violation of its charter? Could not the city thereafter, upon discovering its inability to make such a contract, receive the bonds back and make payment in some other way? Or could it not have received the bonds as a payment to that extent of an indebtedness due from their holder to the city?

Unless such transactions be legal, then it follows that the State could obtain the property or labor of the individual and pay therefor in an obligation which it had no right to issue, and which it could on that account subsequently repudiate and then deny all liability to pay at all. The character of the transaction is not altered by the transfer of these warrants from the original holder to other parties, and the State has full power to recognize in favor of the bearer of the warrants, the validity of the debt which they originally represented, and to pay the same by allowing a credit to their bearers up to the value of the warrants. We see nothing in morals or in law which should prevent the State from recognizing and liquidating the indebtedness which was due from it and which was represented by the warrants.

The other theory would prevent the State from ever redeeming warrants in form invalid, but which had been issued in payment of debts due from the State to persons receiving them.

If payments such as were made in this case were not valid, but absolute nullities, then any person who used the warrants to pay his taxes with, although they were received by the collector and an acquittance given, was nevertheless liable to pay those taxes again. Such consequences ought not to follow from the fact that the form of the warrant in which the payment was made rendered the warrant itself illegal as issued in violation of the Constitution.

Their receipt by the state officers from the railroad company as directed by the legislature is also justified, as appears by the case of *Little Rock* v. *National Bank*, 98 U. S. 308. This court held that even if the bonds mentioned therein were issued in violation of law, yet when the city accepted their surrender and redeemed them by giving other bonds in lieu of a portion and a credit on the books of the city for another portion of them so surrendered, such transaction was valid, and the holder of the bonds so given in lieu of the illegal ones, could recover on them, and also upon the credit given on the books of the city. We perceive no reason why the State could not, if it chose, receive these warrants in discharge of the debt *pro tanto* due it from the company.

The next question is whether the payments made are void because the warrants were issued, as alleged, in aid of the rebellion.

If by reason of any fact existing at the time these transactions occurred, and which appears in this record, the payments in question were not valid, and no valid contract grew out of the same, then the judgment should be affirmed, notwithstanding we differ with the court below in regard to the effect of the payment on the ground taken by that court. Until we are able to say there was a valid contract subsisting by reason of these transactions, by which payments were received as payment *pro tanto* of interest and sinking fund, we cannot be called upon to discuss the question whether any legislation subsequent to the making of the alleged contract has impaired its obligation. We must, therefore, pursue the inquiry in order to determine the existence and validity of the contract.

It is alleged that at least some of these warrants were issued in aid of the rebellion and were therefore void, and no attempted payments made in them could be recognized as legal or binding. Various acts of the legislature have been referred to which provided for the issuing of bonds in return for loans to the State for military purposes. The findings of the trial court upon the subject were as follows:

"I find that it has not been proved whether the warrants actually used in making the payments were warrants issued for

indebtedness incurred prior to the civil war or warrants issued for the State indebtedness incurred after the war began, or if of the latter class whether they were warrants issued for military purposes or for civil indebtedness, but from the circumstantial evidence I conclude that neither the railroad company nor the State discriminated as to the class of warrants the railroads received for carrying services or paid on their indebtedness, and that some of all kinds were used in making the payments.

* * * * * * * *

"In reaching the foregoing conclusions of fact I have excluded from my consideration the statements made in official reports and governors' messages to the legislature, having concluded that defendant's objections that the statements contained in these papers were not admissible as evidence proving or tending to prove the facts therein stated, were good. I have also eliminated from consideration certain other evidence, as shown by explanations attached to defendant's bills of exception."

Taking these findings, it seems that some of the warrants had been originally issued for military purposes, while others had been issued for civil indebtedness. It is also to be inferred from the record that the warrants were in the hands of various people, residents in the State, from whom they had been purchased by the company for a fair and adequate consideration, or had been received by it at par in payment of freight or passenger services over its lines of road. Assuming that the warrants were invalid as having been issued in payment for services rendered, or stores received for use in aid of the rebellion, yet this contract between the State and the company had no connection with the purpose for which they were issued, nor was the consideration of the contract based in the remotest degree with reference to that purpose. The warrants were issued to other persons having not the slightest relation to the company, and in payment of an indebtedness for purposes to which the company was an entire stranger. The purpose of the company was undoubtedly, pursuant to the offers of the State made in the acts mentioned, to use the warrants in payment of what might be due for principal or interest on the bonds of the company held by the State.

There is no proof that the company received the warrants for any other purpose. No inference could properly, as we think, be drawn from the evidence that there was any intent, design or wish on its part to aid the rebellion by the acquisition of these warrants and so far as can be seen, it was a transaction in the way of the business of the company, entered into for the simple purpose of paying an indebtedness which it owed the State, and which, by these acts, the State permitted to be paid in this way. Even though portions of the warrants had been procured at less than par, of which fact there is no affirmative evidence, still the transaction on the part of the company did not thereby become one in aid of the rebellion, and upon this point we do not see that the prices which may have been paid for the warrants were material in the inquiry. The contract between the State and the company did not in any way aid the former in issuing them, nor did it aid the purpose for which the State may have desired to issue them.

Where the validity of a contract is attacked on the ground of its illegal purpose, that purpose must clearly appear, and it will not be inferred simply because the performance of the contract might possibly result in a remote, incidental and unintentional aid to an illegal transaction.

It is somewhat difficult to see how the offer to receive these warrants and their reception pursuant to the offer can be said to be illegal as based upon a consideration which looked to aiding the rebellion by its performance.

It has been held that a contract between parties resident within the lines of insurrectionary States stipulating for payment in Confederate notes, issued in furtherance of a scheme to overturn the authority of the United States within the territory dominated by the Confederate States, was not to be regarded for that reason only as invalid. Contracts thus made, not designed to aid an insurrectionary government, it was held, could not therefore, without manifest injustice to the parties, be treated as invalid. *Thorington* v. *Smith*, 8 Wall. 1; *Delmas* v. *Insurance Co.*, 14 Wall. 661.

The receipt of these warrants, like the contract to receive payment in Confederate notes, was not for that reason only

unlawful, although the State was the party that received them. The company was not an agent of the State in putting them in circulation, nor is there any proof that in fact it circulated any of them. The company did not take them for the purpose of giving currency to them, but in order to consummate a transaction which, when consummated, was simply a business one on the part of the company, and if by any possibility it could "indirectly or remotely promote the ends of the *de facto* government organized to effect a dissolution of the Union, it was without blame, except when proved to have been entered into *with actual intent* to further invasion or insurrection." *Thorington* v. *Smith*, 8 Wall. 1, 12; *Baldy* v. *Hunter*, 171 U. S. 388, 394.

A specimen of the contract condemned under the rule is to be found in *Sprott* v. *United States*, 20 Wall. 459, where the plaintiff sought to recover from the defendant the value of certain cotton which he had purchased from and paid the price in money to the Confederate government and which the Union forces took from its possession in the last days of the existence of that government. The court held that in the transaction the plaintiff gave aid and assistance to the rebellion in the most efficient manner he possibly could; that he could not have aided that cause more acceptably if he had entered its service and become a blockade runner, or under the guise of a privateer had preyed upon the unoffending commerce of his country. The plaintiff asked the court to in effect carry out his void contract with the Confederate government. That is very different from holding that these warrants were so far void that they could not form the basis of payment of debts by their holders, who had not received them from the State but had taken them in the course of business from other parties and who then offered them in payment of their debts due the State.

This whole subject has recently been gone over in *Baldy* v. *Hunter*, 171 U. S. 388, where many other cases are commented upon, and the principle of that and the other decisions of this court therein referred to would seem to hold this contract not unlawful.

But suppose these warrants were issued in aid of the rebel-

lion and were therefore void, and that the subsequent offer of the State to receive them in payment of the debt of the company, under the provisions of the legislative acts already referred to, was, while unexecuted, also void on that ground, still their actual receipt and the acquittance given were not, for that reason, void as between these parties.

A contract in aid of the rebellion has been held illegal because it belonged to that class of contracts which are *mala in se*, whose consideration is immoral and founded upon a criminal purpose. If a State were a party to such a contract it would not be void on the technical ground that it was *ultra vires* as beyond the contract making power of the State, but because of the illegal nature of its consideration. The contract would be void for the same reason that it would be void as between individuals, not because they had no capacity to make it, but because, being founded upon an illegal consideration, no court would recognize its validity or enforce its provisions. A State as a sovereignty has power generally to make contracts, unless there be some constitutional inhibition as to certain classes of contracts, and if the consideration of a particular contract is bad or immoral, the contract is illegal because of the character of its consideration, and not because the contract would be beyond the general scope and power of the State. Hence, as between the parties to it, the State might, if it chose, perform all its requirements, and if the acts of its officers were performed in obedience to legislative authority, their performance in executing the contract would be the act of the State. If, on the other hand, the constitution of the State had prohibited its officers from ever receiving anything but gold in payment of this debt of the company, a delivery of something else in assumed payment of the debt, though received as such by its officers under the authority of the legislature, would be no payment. That would be a case where the payment would be absolutely void because beyond the capacity of the State to authorize and equally beyond its capacity to ratify. It would be *ultra vires* in the strict sense of the term. In such event, it would be true that the act of the officer would be his individual act, and in no sense would he represent or bind the State by his action. Such

an attempted payment might, therefore, be regarded by any subsequent officer of the State as wholly void and ineffectual for any purpose.

The distinction between the two cases is obvious. In the one the contract is void because of the illegality of the consideration, not because of the legal incapacity of either party to make the contract, while in the other there is an entire lack of power to make it under any circumstances. When, therefore, the officers of the State pursuant to its statutes received the warrants as payment, they acted for the State in carrying out an offer upon its part which the State had the legal capacity to make and to carry out, and which it in this manner did carry out. The State in such case had the same power to carry out its contract (so far as the parties to it are concerned) as individuals would have had to carry out the same kind of a contract, and when the warrants were received by the officers acting for the State in payment of the interest, and the bonds of the State were issued to the school fund and acquittance given to the company, the transaction was finished and completed, in the case of the State, just as it would have been in like circumstances in the case of the individual, and by such action (as between the parties) the State is bound; the acts of its officers are its own acts, and it must be judged in the same way as an individual would be judged. In other words, the contract having been fully executed by the company and the State, neither party having chosen to refuse to perform its terms, neither party as between themselves can thereafter act as if the contract had not been performed, nor can the State pass any act which shall impair the obligation which springs from its performance. After the complete execution of the transaction it must be that each party thereupon and at once became possessed of certain legal rights arising from its performance. Neither party could undo what had been fully executed and completed, and the law therefore implies a contract that neither party will attempt to do so, or, in other words, the law implies a contract that the payments made shall not be thereafter repudiated or denied. Any subsequent statute of the State which repudiated or permitted the repudia-

tion of the payments would impair the obligation of the contract which the law raises from the transaction itself.

That a contract will be implied under such circumstances is stated in *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 500. There the court said: "Some of the authorities show that, though an illegal contract will not be executed, yet when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, *express or implied*, and the court will not unravel the transaction to discover its origin."

So in this case. The illegal object was fully executed and accomplished, and upon its accomplishment and by reason of the whole transaction there arose an implied contract that the settlement should be conclusive upon all parties to it. This principle calls for no aid from the court in the enforcement of a void contract. The parties have already fully complied with all its terms, and by reason thereof the implied contract has arisen.

The State cannot now be permitted to repudiate or set aside the acts of its former officers, done in pursuance of the direction of the legislature of the State, and effectually and forever closed long before the present proceeding was commenced. As between the parties to those transactions, this cannot be done.

The action of the present officers of the State in bringing this proceeding has been undoubtedly prompted by the best motives and from a desire to promote the true interests of their State, but we nevertheless are unable to see how the proceeding can be successful without overturning those principles of law which must guide and control our judgment.

We are then brought to the question whether the subsequent legislation of the State has in any manner impaired the obligation of the contracts made by the State at the times when these various payments were made.

We have shown in the treatment of the motion to dismiss how the judgment of the court below gave effect to the subse-

quent act of 1870. In giving such effect was the obligation of the contract between the parties impaired thereby?

If the State had passed no act, the question of contract could not have been raised in this court, the payments might have been repudiated, and the court have held them illegal, and we would have no jurisdiction to review its judgment. But the State has passed a statute, and said that if the company would pay interest and a certain proportion semi-annually upon the aggregate amount of the loan as it stood May 1, 1870, no further exaction would be made. The court has construed this to mean that if the company will pay such proportion semi-annually on the amount of the loan, to be ascertained by striking out the payments in warrants, then no default will be incurred, but if not, then it will have made default, and the act of 1870 provides in such case for proceedings to collect the amount due. We say the court below has so construed the act, and we say so notwithstanding it has not mentioned it in any such connection. It has said so, however, by implication necessarily arising from the judgment it has given when taken in connection with the provision of the act which permits proceedings only to be taken on a default, which does not exist in this case if the company be credited with these warrants as payments. By permitting the proceedings the court has necessarily construed the act as meaning that there is a default when payments are not made on the basis of the invalidity of the payments in warrants. The obligation of the contract which we hold existed between the State and the company growing out of the transactions mentioned has therefore by this construction of the act by the state court been materially impaired.

It is alleged on the part of the State that the acceptance of the treasury warrants in payment of money loaned from the school fund was a violation of the constitution of the State of Texas, as being an illegal diversion of that fund. Upon that point we agree with the court below, (which held that there was no such diversion,) for the reasons given by that court.

We have examined the various objections of the defendant in error which it has made because of the alleged failure of the

plaintiffs in error to properly bring the Federal question before the court, but we think they are not well taken.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed and the case remanded to that court with directions to remand the case to the District Court, with directions to reverse its judgment and for further proceedings not inconsistent with the opinion of this court, and is so ordered.

MR. JUSTICE BROWN concurring:

I concur in the conclusion of the court, but from so much of the opinion as holds that the treasury warrants in question were not bills of credit within the meaning of the Constitution of the United States, I am constrained to dissent.

It is admitted that these warrants fulfill all the conditions of bills of credit, except, as it is said, they were not intended to circulate as money. I am unable to concur in this view of the intent of the legislature. By the act of February 14, 1860, authorizing interest bearing warrants on the treasury, it was expressly provided that these warrants should not circulate as money, but might be assigned. This act was repealed, however, in 1862, by another act providing that warrants should be drawn for legal claims against the State, and payment made, if there were money in the treasury; but if not, the comptroller was authorized to issue warrants payable to the party entitled to payment, or bearer, which warrants should be of such proportions of the claim as were required by the holder, one-tenth of the whole amount of which might be issued in warrants of one dollar each, and the residue in warrants of five dollars or more each. There was an omission in this act, which appears to me extremely significant, of the proviso of the former act that such warrants should not circulate as money. By another act, approved the following day, it was provided that treasury warrants of the State, not bearing interest, should be receivable "as money" in the payment of taxes, office fees (including fees for patents) and land dues payable in the general land office of Texas, and all other dues to be collected for the State, with

certain specified exceptions. By another act of December 16, 1863, the comptroller was authorized to receive from the railroad companies indebted to the special school fund all interest on their bonds that might be or might thereafter become due in state treasury warrants. This act was amended May 28, 1864, by providing that the act of 1863 should not apply to railroad companies which refused to receive these bonds or treasury warrants at par for freight or passage, at the prices or rates established by law.

The railway companies were thus compelled to receive these warrants as money from their patrons in order to be able to avail themselves of them in payment of interest upon their bonds. In addition to this, the warrants were in the form of bank notes, printed upon peculiar paper, such as is ordinarily used by banks for their circulating notes, and contained a brief and unconditional promise of the State to pay the amount to a party named, or bearer, and were declared on their face to be receivable for public dues.

If these facts be not decisive of an intention that these warrants should circulate as money, it is difficult to say what additional facts were needed to manifest that intent. Indeed, the opinion of the court seems to me to practically eliminate from the Constitution the provision that the States shall not emit bills of credit, as well as to overrule the opinion of this court in *Craig* v. *Missouri*, 4 Pet. 410. In that case, the legislature of the State of Missouri authorized the officers of the state treasury to issue certificates, of denominations not exceeding ten dollars, nor less than fifty cents, in the following form: "This certificate shall be receivable at the treasury of any of the loan offices in the State of Missouri, in discharge of taxes or debts due to the State, for the sum of ——— dollars, with interest for the same, at the rate of two per cent per annum from this date." These certificates were receivable at the treasury in payment of taxes, or moneys due to the State, or to any municipality, and by all officers, civil and military, in the discharge of salaries and fees of office. If simple certificates of the State, containing no promise to pay, are bills of credit, much more, it seems to me, should these obligations of the State of

Texas issued in denominations of one dollar and upwards, in the size, shape and color of bank notes, and receivable in discharge of all taxes and debts due the State, to which a forced circulation was given as between railways and their patrons, be held to be obnoxious to the same provision of the Constitution. As was said by Chief Justice Marshall in that case: "The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees would give them currency. They were to be put into circulation; that is, emitted, by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character, and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed 'bills of credit' instead of 'certificates' nothing would have been wanting to bring them within the prohibitory words of the Constitution."

But I fully concur with the court upon the second point, that the State, having issued these warrants for a valuable consideration, having put them in circulation, having expressly authorized the railroad companies to pay them in discharge of their interest upon their bonds, and having received them without objection at the time, it is too late now to claim that they did not operate as payment. Though the warrants may have been issued without authority, it was competent for the State to recognize them, and to refuse now to admit them as payment upon these bonds appears to me a plain violation of the public faith. Upon the theory of the Court of Civil Appeals, I see nothing to prevent the State, unless there be a statute of limitations operative against it, from bringing suit against everybody who paid these warrants to the State for taxes or for dues, and recovering the amount a second time.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY CO. *v.* TEXAS. Error to the Court of Civil Appeals for the Third Supreme Judicial

Statement of the Case.

District of the State of Texas. No. 82. Argued with No. 81. Decided March 26, 1900.

This involves precisely the same questions that have just been determined in the foregoing case, and the same judgment will, therefore, be entered. Same counsel as in No. 81.